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OF THE

NATIONAL LABOR RELATIONS BOARD

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been shown to have been so intolerable from the physical, mental, or financial aspect, that La Fleur had no alternative but to quit after 1 day.[60] He could have continued to work in the A Room unless it reached an intolerable point and could have sought reinstatement, through the Act, to his former job in the main dining room and with reimbursement for the difference in his earnings. Since La Fleur elected to quit before a point of intolerability was reached, I believe, while recognizing this right to quit on the facts of the case and while recognizing the Employer's basic responsibility for such action, that the limitation on backpay, heretofore mentioned, is appropriate in the circumstances of this case.[61]

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of the Act and is engaged in interstate commerce.
2. The Union is a labor organization within the meaning of the Act.
3. Respondent, as found hereinabove in section III, has violated Section 8(a)(1) of the Act.
4. Respondent, as found hereinabove in section III, has discriminated against Wilbur La Fleur in violation of Section 8(a)(1) and (3) of the Act.

[Recommended Order omitted from publication.]

[60] Situations of the "intolerable type" described merit no limitation on the basis of the backpay computation. Although "intolerability" need not necessarily be so extreme, the following is an example of a situation where the discriminatee has no choice but to quit forthwith: A 55-year-old clerk weighing 125 pounds is discriminatorily transferred to a warehouse job where he is to lift 100-pound bags from a conveyor and load them on racks above shoulder level for 8 hours a day.

[61] It is unnecessary to define precisely what a point of intolerability would have been. Perhaps if La Fleur had worked a week or 10 days and if his earnings in the A Room for that period were $10 or $15 per day less than those of his former job, the point of intolerability would have been reached. If instead of being transferred to the A Room La Fleur had been made a dishwasher or garbage man that might well have been without more a point of intolerability in the circumstances herein.

Backpay is to include interest at 6 percent and is to be computed in accordance with the principle of *F. W. Woolworth Company*, 90 NLRB 289.

Independent Metal Workers Union, Local No. 1 *and* Independent Metal Workers Union, Local No. 2 *and* Hughes Tool Company, Party of Interest

Hughes Tool Company *and* United Steelworkers of America, AFL–CIO, Petitioner *and* Independent Metal Workers Union, Locals Nos. 1 and 2. *Cases Nos. 23–CB–429 and 23–RC–1758. July 1, 1964*

DECISION AND ORDER, AND ORDER RESCINDING CERTIFICATION

On February 26, 1963, Trial Examiner Frederick U. Reel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent has engaged in unfair labor practices and recommending that it cease and desist therefrom and that it take certain affirmative action, as set forth in the attached Intermediate Report. In Case No. 23–RC–1758, consolidated by the Board with the unfair labor practice case, the Trial Examiner recommended that the joint certification

issued to Independent Metal Workers Union, Locals Nos. 1 and 2, be rescinded. Exceptions and briefs have been filed by Independent Metal Workers Union, Local No. 1, also known herein as Respondent, and by Independent Metal Workers Union, Local No. 2, the Charging Party. *Amicus curiae* briefs have been filed by the United States Department of Justice, the American Civil Liberties Union, and the United Automoblie, Aerospace and Agricultural Implement Workers of America, AFL–CIO, contending that the Respondent committed unfair labor practices.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and adopts the findings, conclusions, and recommendations of the Trial Examiner with the additional comments noted herein.[1]

With respect to the unfair labor practice case, we agree with the Trial Examiner for the reasons stated by him that Local No. 1, by its failure to entertain in any fashion or to consider the grievance filed by an employee in the bargaining unit, Ivory Davis, and by its outright rejection of Davis' grievance for reasons of race, violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act. We further agree with the Trial Examiner, contrary to the Charging Party's contention, that the validity of the racially discriminatory contracts between Local No. 1 and the Company was not placed in issue by the complaint in the unfair labor practice case. Similarly, racial segregation in union membership was not placed in issue in *that* case. This conclusion is not to be construed, however, as a disagreement on our part with the contentions of the Charging Party that the negotiation of racially discriminatory terms or conditions of employment by a statutory bargaining representative violates Section 8(b) of the Act[2] and that racial segregation in membership, when engaged in by such a representative, cannot be countenanced by a Federal agency[3] and may violate Section 8(b).[4] We would be content to terminate our discussion of the unfair labor practice case at this point and to rely, as we do, upon the Trial Examiner's treatment of the issues, but the separate opinion of Chairman McCulloch and Member Fanning, in which they disagree with us at length, necessitates additional comments in this majority opinion.

[1] The requests of the Charging Party and the Department of Justice for oral argument are hereby denied, as the record and briefs adequately present the issues and the positions of the parties.

[2] Cf. *Steele* v. *Louisville and N.R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768.

[3] *Brown* v. *Board of Education*, 347 U.S. 483; *Bolling* v. *Sharpe*, 347 U.S. 497; *Shelley* v. *Kraemer*, 334 U.S. 1; *Hurd* v. *Hodge*, 334 U.S. 24.

[4] See footnote 7 in the Intermediate Report.

With respect to the Section 8(b)(1)(A) violation, the separate opinion relies upon cases which were advanced by the General Counsel for consideration by the Trial Examiner. The latter's discussion of the subject in his Intermediate Report casts much doubt upon the applicability of the cases. Moreover, as we understand the separate opinion, our colleagues would find an 8(b)(1)(A) violation only because the Negro employee, Ivory Davis, who is a member of the Negro local of Independent Metal Workers Union, is not a member of Local No. 1, the Respondent. In other words, our colleagues appear to say that, in another factual context, when a statutory bargaining representative does not practice segregation or other racial restrictions in membership, such representative may refuse, on racial grounds as distinguished from nonmembership grounds, to consider a meritorious grievance of a Negro in the bargaining unit, seeking by such refusal to keep Negro employees in inferior jobs, and that such refusal does not violate Section 8(b)(1)(A). We cannot concur in our colleagues' view of the law. We rely instead upon the Trial Examiner's reasoning in finding a violation of Section 8(b)(1)(A).

The separate opinion utilizes this case as an opportunity to reiterate and enlarge the dissenters' views in *Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Miranda Fuel Company, Inc.)*, 140 NLRB 181. We need not detail the bases of our disagreement. We note only a few facts. When the Supreme Court enunciated the duty of fair representation in *Steele* and *Tunstall*, *supra*, which were Railway Labor Act cases, the Court emphasized in each case the lack of an administrative remedy as a reason for holding that Federal courts constitute a forum for relief from breaches of the duty. In this connection, it should be noted that provisions of the Railway Labor Act which are substantially identical to certain unfair labor practice provisions of the National Labor Relations Act are enforcible by the Federal courts, not by an administrative agency. When the Labor Board, in recognition of the *Steele* and *Tunstall* doctrines, held that under the Wagner Act statutory bargaining representatives owe to their constituents a duty to represent fairly, the Board's holding necessarily was confined to representation proceedings because the Board had no power to issue an order against a labor organization. After enactment of the Taft-Hartley Act, however, an administrative remedy became available in our view and in the view of various legal scholars whose works appear in articles cited in the separate opinion and in the Intermediate Report,[5] as well as in briefs *amici* in this case and be-

[5] See, in particular, Sovern, "The NLRA and Racial Discrimination," 62 Col. L. Rev. 563; Sovern, "Race Discrimination and the NLRA: The Brave New World of Miranda," New York University Sixteenth Annual Report on Labor (1963); Cox, "The Duty of Fair Representation," 2 Villa. L. Rev. 151. See also, Blumrosen, "The Worker and Three Phases of Unionism: etc.," 61 Mich. L. Rev. 1435.

fore the court of appeals in *N.L.R.B.* v. *Miranda Fuel Co.*, 326 F. 2d 172 (C.A. 2). Moreover, a majority of the panel of the court which decided that case expressly refrained from determining whether a breach of the duty of fair representation violates Section 8(b)(1)(A), and the Supreme Court said recently that the question is open, *Humphrey* v. *Moore*, 375 U.S. 335, 344,[6] as indeed our dissenting colleagues concede.

If our 8(b)(1)(A) theory is unsound, as our colleagues assert, it follows that no 8(b)(1)(A) violation has been found in this case because we cannot concur in our colleagues' 8(b)(1)(A) theory. Consequently, we address ourselves to our colleagues' assertions concerning the 8(b)(2) and (3) violations found by the Trial Examiner. Our colleagues contend that those violations are not properly before us procedurally and, in any event, that there have been no such violations on the merits. We disagree on both counts. Our colleagues' discussion of the procedural question reflects a misunderstanding of the grounds on which the Trial Examiner concluded that there was no procedural barrier to the resolution of the 8(b)(2) and (3) issues. The reference to the Charging Party's motion to amend the complaint by alleging a violation of Section 8(b)(2) on a set of facts not recited in the complaint (the negotiation of racially discriminatory contracts) and the references to the Respondent's assertions that the issue had not been alleged or litigated, that the Respondent had been unprepared to defend on the issue, and that the Respondent possessed material evidence which it had not offered, are in our view irrelevant. This is so because the Trial Examiner denied the Charging Party's motion, and we have affirmed his ruling. The procedural question, as ably set forth by the Trial Examiner at the hearing and in his Intermediate Report, is whether, when facts have been alleged and fully litigated, the Board is precluded from finding violations of Section 8(b)(2) and (3) merely because the General Counsel chose not to allege as a legal conclusion that the pleaded and litigated facts violate those sections of the Act. The *American Newspaper Publishers Association* case cited by our colleagues and the Trial Examiner clearly supports the latter's deter-

[6] *Syres* v. *Oil Workers International Union*, 350 U.S. 892, which is discussed in footnote 24 of the separate opinion, is of little independent weight on the issue here. The Supreme Court, in its *per curiam* opinion, cited Railway Labor Act cases only, thereby indicating the *Steele* and *Tunstall* principles invalidating racially based representation are equally applicable under this Act. Judge Rives, dissenting in the court of appeals, also cited such cases for the proposition that "[t]here are no adequate remedies available to appellants under the National Labor Relations Act or through the Board," 223 F. 2d at 747. Neither Court appears to have been confronted with the question whether, under Taft-Hartley, the right to fair representation is inherent in Section 7 and whether, therefore, an administrative remedy had become available. See *Blumrosen, supra,* footnote 5, at page 1504, where the author, citing *Syres,* comments that "[t]he duty [of fair representation], however, was carried over into the NLRA without a full examination of NLRB's power to enforce it."

mination. Moreover, the recent *Frito Company* case[7] contains the following pertinent paragraph:

> It is now settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board. If the General Counsel can control this process, then the General Counsel can indeed usurp the Board's responsibility for establishing policy under the Act by simply withholding from the Board any issue which might precipitate a meaningful policy decision not in accord with the views of the General Counsel.

We conclude that the Trial Examiner properly considered whether the conduct of the Respondent set forth in the complaint violated Section 8(b)(2) and (3).[8] We conclude also, for the reasons given by the Trial Examiner, that he correctly found violations of those sections of the Act.

Turning to the representation case, we join the separate opinion of our colleagues in holding that the *Pioneer Bus* doctrine[9] requires that the certification issued jointly to Locals Nos. 1 and 2 on October 18, 1961, be rescinded because the certified organizations executed contracts based on race and administered the contracts so as to perpetuate racial discrimination in employment. The separate opinion fails, however, to treat two issues which are of crucial importance today. First, the separate opinion disregards certain constitutional limitations upon the Board's powers. Second, the separate opinion fails to join in overturning an outmoded and fallacious doctrine which the Board established long ago. Specifically, we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1; *Hurd* v. *Hodge*, 334 U.S. 24; *Bolling* v. *Sharpe*, 347 U.S. 497. We hold too, in agreement with the Trial Examiner, that the certification should be rescinded because Locals Nos. 1 and 2 discriminated on the basis of race in determining eligibility for full and equal membership, and segregated their members on the basis of race. In the light of the Supreme Court decisions cited herein and others to which the Board adverted in *Pioneer Bus*, we hereby expressly overrule such cases as *Atlanta Oak Flooring Company*, 62 NLRB 973; *Larus & Brother*

[7] *The Frito Company, Western Division* v. *N.L.R.B.*, 330 F. 2d 458 (C.A. 9).

[8] Although it was not essential in our view that the Trial Examiner notify the parties at the hearing that he might decide whether the conduct alleged and litigated violated Section 8(b)(2) and (3), we note, as does the separate opinion, that the Trial Examiner did so notify the parties and that, additionally, he invited them to brief the points. See also *Frank B. Smith d/b/a Little Lump Coal Co.*, 144 NLRB 1499.

[9] *Pioneer Bus Company, Inc.*, 140 NLRB 54.

Company, Inc., 62 NLRB 1075; and other cases epitomized by the language of the Board's Tenth Annual Report, quoted by the Trial Examiner at footnote 9, insofar as such cases hold that unions which exclude employees from membership on racial grounds, or which classify or segregate members on racial grounds, may obtain or retain certified status under the Act.

We are not confronted at this time, as we were in *Pioneer Bus*, with a new petition for certification, and thus we have no present occasion for prescribing a notice such as that recommended by the Trial Examiner as a condition for certification. We intimate no disapproval of that recommendation, however, and we shall entertain it if occasion to do so should arise. We also commend it to the consideration of the Regional Director in the event that he should be called upon to issue a certification of representatives at this plant.

ORDER

The certification of October 18, 1961, in Case No. 23–RC–1758 is hereby rescinded.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order the Order recommended by the Trial Examiner in Case No. 23–CB–429 and orders that the Respondent, Independent Metal Workers Union, Local No. 1, its officers, agents, representatives, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

CHAIRMAN MCCULLOCH and MEMBER FANNING, concurring in part and dissenting in part:

During the relevant period, Independent Metal Workers Union, herein called the Independent, consisted of two locals: Local 1 comprised of white employees of Hughes Tool Company, herein called the Company; Local 2 of Negro employees. The constitution of the Independent provides that each local shall have "complete, final and exclusive authority" to handle and negotiate with the Company all "matters of every kind and character" pertaining to its members and other employees of like color for whom it is the bargaining agent.

In 1959, following an election, the Board jointly certified Locals 1 and 2 as bargaining representatives of the Company's production and maintenance employees. Thereafter Locals 1 and 2 negotiated with the Company a collective-bargaining contract effective to September 1961 and from year to year thereafter unless terminated. This agreement, presumably like its predecessors, designated certain jobs as available only to white employees, and others to Negro employees. The jobs for Negro employees were inferior to those for white employees. On October 18, 1961, following another election, Locals 1

and 2 were again certified as joint bargaining representatives of employees in the appropriate unit. In the fall of that year the 1959 contract was opened for renegotiation. The two locals were unable to agree on a proposal advanced by Local 2 for the elimination of racial discrimination.

On December 18, 1961, Local 1 and the Company signed a new agreement "amending and extending" the 1959 contract. Local 2 refused to sign. In spite of this, and over Local 2's protest, the Company put the new contract into effect immediately. Simultaneously, Local 1 and the Company agreed to enlarge the number of apprenticeships in the plant. These apprenticeships, under the terms of the contract, were available only to white employees. When the apprenticeships were opened for bids, Ivory Davis, a Negro employee member of Local 2, bid for one of the apprenticeships. His bid was rejected by the Company because he was not eligible for the apprenticeship under the terms of the 1959 or 1961 collective-bargaining contracts. Davis then wrote the president of Local 1 asking that Local 1 represent him in processing a grievance in this matter. Local 1's president did not reply.

On May 27, 1962, Davis filed an unfair labor practice charge alleging that Local 1's failure to process his grievance violated Section 8(b)(1)(A) of the Act. On August 31, 1962, the General Counsel issued a complaint to this effect. In its answer to the complaint, Respondent Local 1 defended its refusal to process Davis' grievance on the grounds that: (1) there was no merit in the grievance in view of the contract provisions; (2) the constitutional provision referred to above precluded it from processing a grievance on behalf of a member of Local 2; and (3) in the past the Company had refused to permit the two locals jointly to process grievances which were applicable only to members of one of the locals.

On October 24, 1962, Local 2 filed a motion to rescind the certification issued to Locals 1 and 2 upon the grounds that the practice of Local 1 in discriminating against Negroes and the existence of segregated locals rendered the certification invalid.

For the purposes of convenience, the two cases, one to rescind the certification, the other alleging unfair labor practices, have been consolidated in a single proceeding.

We join with the majority members in adopting the Trial Examiner's recommendation for the rescission of the certification. However, we do so because of the discriminatory contract negotiated by the certified unions and the employer.[10] We find it unnecessary at this time to pass on the other grounds relied upon by the Trial Examiner in making his recommendation.

[10] *Pioneer Bus Company, Inc.*, 140 NLRB 54.

We also join with the majority in holding that Respondent violated Section 8(b)(1)(A), but we rest this conclusion on a ground different from that of the majority. We do not agree with the majority that Respondent violated Section 8(b)(2) and (3).

I.

The complaint in the unfair labor practice case did not allege that either the collective-bargaining contracts negotiated with the Company or the establishment of segregated locals violated the Act. It alleged only that Respondent Local 1 had restrained and coerced employees in violation of Section 8(b)(1)(A) by refusing to process Ivory Davis' grievance. It did not allege that by this or other conduct Respondent Local 1 had also violated Section 8(b)(2) and (3). This was not an oversight, but the result of a deliberate choice of theory by the General Counsel, as is evident from the following:

In his opening statement, the General Counsel said that the "paramount issue" is "whether or not a certified union violated Section 8(b)(1) . . . by refusing to process, because of his race, the grievance of a Negro employee in the appropriate unit." At this point, the Trial Examiner interrupted with the statement:

> You make no contention in your complaint, I have heard no amendments offered, that this violates any section of this Act other than 8(b)(1)(A). Specifically I have heard no contention that this violates Section 8(b)(2), no contention that it violates Section 8(b)(3), is that correct?

The General Counsel replied, "That's correct, Mr. Trial Examiner." The Trial Examiner continued:

> And if in the judgment of this Trial Examiner or reviewing authorities this conduct might violate some other section of the Act, it is nonetheless outside the scope of this proceeding, and therefore it's unnecessary to consider or to reach any question as to whether the conduct of this labor organization violated any section of this Act except 8(b)(1)(A), is that the position of the General Counsel?

The General Counsel replied:

> Yes, sir. The only allegation that we now have before the Trial Examiner is the matter of violation of Section 8(b)(1)(A) of the Act.

The Trial Examiner added:

> I believe there is some authority, not judicial authority, nor even Labor Board authority, I mean commentator authority, commentary in the law reviews, I believe one by the present Solicitor

> General, that suggests this conduct might violate some other section of the Act, but notwithstanding that, General Counsel makes no allegation here other than a violation of Section 8(b)(1)(A), and that is the only issue that General Counsel wishes to have passed on in this proceeding, is that correct?

Again the General Counsel answered in the affirmative.

At no time did the General Counsel change his position or move to amend the complaint to allege violations of Section 8(b)(2) or 8(b)(3). At the close of the case, the Trial Examiner granted the General Counsel's motion to conform the pleadings to the proof, but only as to "such insubstantial matters as the spelling of names and dates and in no respects material to the issues."

At the close, the attorney for the Charging Party also moved to amend the complaint to allege, on the basis of the evidence adduced, that Respondent Local 1 had violated 8(b)(1)(A) and (2) "in that it has negotiated contracts and agreements with the Employer which discriminated because of membership or lack of membership in the Union and because of race." Respondent's attorney strenuously objected. He stated that the issues raised by the proposed amendment had not been fully litigated, that if the proposed amendment had been included in the complaint "there is a good deal of additional evidence that I would have put on in connection with this matter . . . . And there would be a good many things that we could bring into this record that would be very germane to that question if it had been an issue. And we would have wanted to be prepared on it. And I think common fairness would have demanded that we have notice of it and be given an opportunity to meet it." General Counsel said he did not join in the motion, but did not oppose it. The Trial Examiner denied the motion "in so far as it constitutes a motion by the Charging Party to amend the complaint" as beyond the province of the Charging Party. The Trial Examiner did state, however, that it might well be his duty to find additional violations of the Act in line with cases which indicate that where an issue is "thoroughly litigated the mere fact that the violation proved may be somewhat different from that alleged in the complaint . . . does not amount . . . to a denial of due process." He also suggested that the parties might brief the merits and the procedural point of due process.

Notwithstanding that the General Counsel in his complaint and by his statements at the hearing indicated clearly that the only issue in the case involved an alleged violation of Section 8(b)(1)(A), the Trial Examiner found violations of Section 8(b)(2) and 8(b)(3). We believe that these latter findings of the Trial Examiner's are impermissible and violated accepted judicial standards of fairness and due process.

The purpose of a complaint is to "notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." [11] Was Respondent apprised or should it reasonably have been apprised by the complaint or statements at the hearing that issues of 8(b)(2) and 8(b)(3) violations were involved in the case? Certainly the complaint contained no such allegations, and at the hearing the General Counsel insisted, despite the prodding of the Trial Examiner, that he was only trying an 8(b)(1)(A) case. Were issues of 8(b)(2) and 8(b)(3) violations nevertheless fully litigated at the hearing? There is absolutely no evidence of this. In fact, when, at the close of the hearing, counsel for the Charging Party moved to amend the complaint to allege a violation of Section 8(b)(2) (he did not seek also to add an 8(b)(3) allegation), counsel for Respondent objected specifically on the ground that the issue had not been litigated, that if he had been timely informed that his client had been charged with an 8(b)(2) violation he would have introduced additional evidence, and that he had not had time to prepare himself on this issue.

The questions of whether a union's nonfulfillment of its duty of fair representation violates any section of the Act, 8(b)(1)(A), (2), or (3), are novel and present great difficulties, as articles in the law reviews attest.[12] It would therefore seem particularly important that the General Counsel specify clearly and in good time the precise sections of the Act a respondent is charged with violating by failing in its duty of fair representation and the theory of his case, so that the respondent may properly prepare its defense and brief and argue the difficult points of law involved. Respondent Union was given no such opportunity on the 8(b)(2) and (3) aspects of the case. It seems to us that in these circumstances "it would derogate elemental concepts of procedural due process" [13] to adopt the Trial Examiner's findings of violation of Section 8(b)(2) and 8(b)(3), regardless of what we would hold if the issues had been properly raised.[14]

The Trial Examiner relied on two cases to justify his findings of 8(b)(2) and (3) violations despite the omissions of the complaint.

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[11] *Charles T. Douds, Reg. Dir.* v. *International Longshoremen's Association, Independent, et al. (New York Shipping Assn.)*, 241 F. 2d 278, 283 (C.A. 2). Section 5(a) of the Administration Procedure Act provides:

> Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.

[12] See Cox, "The Duty of Fair Representation," 2 Vill. L. Rev. 151 (1957); Sovern, "The National Labor Relations Act and Racial Discrimination," 62 Colum. L. Rev. 563 (1962); Note, "Administrative Enforcement of the Right to Fair Representation: The Miranda Case," 112 Penn. L. Rev., 711 (1964).

[13] *N.L.R.B.* v. *H. E. Fletcher Co.*, 289 F. 2d 594, 600 (C.A. 1).

[14] *N.L.R.B.* v. *Fred H. Johnson, d/b/a Atlas Linen and Industrial Supply*, 322 F. 2d 216 (C.A. 6); *N.L.R.B.* v. *H. E. Fletcher Co., supra; Louisville Chair Company, Inc. and Louisville Chair & Furniture Company, Inc.*, 146 NLRB 1380.

We believe that neither case is a precedent for these findings. In the *American Newspaper Publishers* case,[15] the complaint alleged, *inter alia*, that the respondent union had restrained and coerced employees in violation of Section 8(b)(1)(A) by refusing and causing its subordinate union to refuse to bargain collectively in good faith. However, the complaint failed to allege that this conduct also violated 8(b)(3). The Board dismissed the allegation on the ground that the conduct complained of did not violate 8(b)(1)(A), and no 8(b)(3) violation had been alleged. The court reversed the dismissal saying:

> There was an abundance of evidence here to support a finding that the ITU and its agents did fail to bargain in good faith and the *record clearly indicates that the ITU recognized this as one of the charges against it.* The failure to specify in the complaint the correct subsection of the Act did not require the Board to dismiss this charge without a consideration as to the sufficiency of the proof. *Where, as here, the complaint clearly describes an action which is alleged to constitute an unfair labor practice but fails to allege which subsection of the Act has been violated or alleges the wrong subsection, such failure or mistake, if it does not mislead the parties charged, does not prevent the Board from considering and deciding the charge so presented.* [Emphasis supplied.]

Thus, as readily appears from its opinion, the court considered that the failure to allege an 8(b)(3) violation was a nonprejudicial technical error which could and should have been corrected by the Board. The respondent union was not misled by the pleadings because it knew that it was charged with a refusal to bargain, and this issue was litigated. Therefore, there was no injustice in finding a violation of 8(b)(3), despite the fact the complaint had only alleged an 8(b)(1)(A) violation.

In the second case relied upon by the Trial Examiner, *Pecheur Lozenge Co.*,[16] the complaint in one section alleged that the respondent employer had violated Section 8(a)(1) by unlawfully refusing to bargain with the union, and in another alleged that by this and other conduct the respondent employer had violated Section 8(a)(1), (3), and (5).[17] The Board found a violation of Section 8(a)(5) in the

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[15] *American Newspaper Publishers Association* v. *N.L.R.B. et al.*, 193 F. 2d 782, 799–800 (C.A. 7), cert. denied 344 U.S. 812.

[16] *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.*, 209 F. 2d 393 (C.A. 2), cert. denied 347 U.S. 953.

[17] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(a)(5) says it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

A violation of Section 8(a)(5) is derivatively also a violation of Section 8(a)(1).

refusal to bargain, an issue which was fully litigated. The respondent employer argued that the Board could not find that the refusal to bargain violated Section 8(a)(5) because the complaint had only alleged that this conduct had violated Section 8(a)(1). The court upheld the Board's finding saying that the complaint in its entirety clearly alleged a violation of Section 8(a)(5). The court added (298 F. 2d at 402):

> Moreover, the Board would not be precluded from finding that the Company's conduct in December 1949 also violated Section 8(a)(5), even though the complaint had only alleged that such conduct violated Section 8(a)(1). We think it would not matter that the complaint failed to mention a specific section of the Act, if the alleged conduct was in fact violative of that section.

Both these cases, *American Newspaper Publishers* and *Pecheur Lozenge*, involved omissions in pleadings which the courts regarded as little more than typographical and to which they therefore refused to give substantive effect. In each case, the respondent was in fact apprised of the charges against which he had to defend himself and these were fully litigated at the hearing. There was no procedural unfairness. The courts refused to permit respondents to seize on a technicality to escape the consequences of the unfair labor practices which the evidence clearly showed had been committed. The situations in the cited cases are a far cry from that which exists in the present case. They are not precedents for the Trial Examiner's (b)(2) and (3) findings.

Accordingly, on procedural grounds alone, we would not adopt these findings of the Trial Examiner.

II.

One of the allegations of the complaint is that Respondent refused to process Ivory Davis' grievance because he was not a member of Respondent Local 1. In its answer, Respondent admits that it refused to process the grievance and a reason for its refusal was Davis' nonmembership in Local 1. This refusal to represent him in a grievance matter because of his nonmembership was to this extent predicated upon a consideration specifically condemned by the Act, and therefore *prima facie* restrained or coerced him in violation of Section 8(b)(1)(A).[18]

[18] *Peerless Tool and Engineering Co.*, 111 NLRB 853, 858, enfd. *sub nom. N.L.R.B.* v. *Die and Tool Makers Lodge No. 113, International Association of Machinists, AFL*, 231 F. 2d 298 (C.A. 7), cert. denied 352 U.S. 833; *M. Eskin & Son*, 135 NLRB 666, 670, enfd. as modified *sub nom. Confectionery & Tobacco Drivers and Warehousemen's Union, Local 805, IBTCWHA* v. *N.L.R.B.*, 312 F. 2d 108 (C.A. 2); *Local 229, United Textile Workers of America, AFL–CIO (J. Radley Metzger Co., Inc.)*, 120 NLRB 1700, 1708.

An employee has a Section 7 right not to be discriminated against because of membership or nonmembership in the statutory representative. Cf. *N.L.R.B.* v. *Gaynor News Company, Inc.*, 197 F. 2d 719 (C.A. 2), affd. 347 U.S. 17.

Respondent urges three grounds to justify its refusal to press Davis' grievance. They are: (1) the grievance had no merit because of contractual provisions; (2) a clause in the constitution of the Independent, which was not waived by Local 2, precluded it from handling the grievance; and (3) in the past the Company had refused to process grievances presented by a joint grievance committee unless the grievance pertained to members of both locals. We find all these defenses to be without merit.

(1) A collective-bargaining agreement entered into by the certified bargaining representative of the employees in an appropriate bargaining unit which discriminates among employees in the unit solely on the basis of race or color is void [19] since it violates the representative's duty under Section 9 to represent all in the bargaining unit without hostile discrimination. It is immaterial that the discrimination does not appear on the face of the contract, but must be established by resort to parol evidence. In this case, Local 1, over the protest of Local 2, signed a bargaining contract which continued unchanged the previous practice of designating certain jobs, better ones, as available only to white employees, and certain other jobs, inferior ones, as available only to Negro employees. Simultaneously, Local 1 and the Company agreed to increase the number of apprenticeships, which were available only to white employees. By this custom and practice, Negro employees, no matter how well qualified, were precluded from promotion to the more skilled jobs. We would therefore find that the contract provisions upon which Respondent Local 1 relies to support its contention that Davis' grievance was lacking in merit are void and are no defense to its conduct.

(2) The Board certified Local 1 and Local 2 as joint bargaining representative of all production and maintenance employees, white and Negro, in a single unit. The locals had no authority, in effect, to break up this unit into separate units based on race and then to disclaim responsibility except for the employees in their self-constituted units. Quite clearly a union's internal constitutional regulations may not supersede the statutory command. Moreover, contrary to Local 1's contention, Ivory Davis' attempt to have Local 1 handle his grievance was done at the instigation of Local 2 and constituted a waiver of whatever rights Local 2 might have had under the Independent's constitution exclusively to process that grievance. Local 1 must have appreciated this fact because Davis' letter asking for help said a copy was being sent to the president of Local 2 and the writer was sure that the request met with the latter's approval. The whole course of dealing between Locals 1 and 2 about this time also

[19] See Judge Rives' dissenting opinion in *Syres* v. *Oil Workers International Union*, 223 F. 2d 739, 745 (C A. 5), reversed 350 U.S. 892; *Pioneer Bus Company, Inc.*, 140 NLRB 54. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1.

shows, and Local 1 must have so understood, that Davis' request was made with the cooperation if not at the instigation of Local 2. Further, Local 1 upon receiving Davis' request for help never sought to ascertain whether Local 2 was waiving its constitutional right to represent him.

(3) Finally, Respondent's assertion that if it had attempted to represent Davis, either jointly with Local 2 or separately, the Company would have refused to handle the grievance is entirely speculative. The fact is that Local 1 made no attempt to deal with the Company on Davis' behalf. If it had and the Company had refused to recognize the jointly certified unions as Davis' representative, it could have filed refusal-to-bargain charges against the Company and compelled such recognition. This defense is only an afterthought.

Accordingly, we find that Respondent Local 1 restrained and coerced Ivory Davis in violation of Section 8(b)(1)(A) of the Act.

In making this finding we do not rely, as does the majority, on a violation of the duty of fair representation. Our reasons are as follows:

Section 8(b)(1)(A) states that it shall be an unfair labor practice for a labor organization or its agents,

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

Section 7 guarantees to employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through reprseentatives of their own choosing . . . and . . . the right to refrain from . . . such activities . . . ."

Neither Section 8(b)(1)(A) nor Section 7 says anything about a right or duty of fair representation. The legislative history of the Wagner Act and its subsequent revisions are equally silent about the subject.[20] The Supreme Court developed the concept of the duty of fair representation as a correlative to a statutory representative's right—in this Act flowing from Section 9—to represent all employees in the appropriate bargaining unit.[21] Until the Board's 1962 decision

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[20] Note, "Administrative Enforcement of the Right to Fair Representation: The Miranda Case," *supra*, at 718.

[21] *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210; *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248.

Section 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

in the *Miranda* case,[22] enforcement of this duty had always been recognized as within the exclusive province of the courts. If the duty of fair representation is thus enforceable under Sections 7, 8, and 10 of the Act, then under the *Garmon* rule,[23] it may be contended that both State and other Federal tribunals are ousted from jurisdiction. On the other hand, under the *Syres* decision,[24] which recognizes that there is a remedy in the courts, it can plausibly be argued that the Board has no such authority.[25] However, the Supreme Court has recently indicated that the question is still an open one.[26]

As we have stated, neither Section 7 nor Section 8(b)(1)(A) mentions a duty of fair representation. The majority in the *Miranda*

[22] *Miranda Fuel Company, Inc.*, 140 NLRB 181 (Chairman McCulloch and Member Fanning dissenting), enforcement denied 326 F. 2d 172 (C.A. 2).

[23] "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." *San Diego Building Trades Council, et al.* v. *J. S. Garmon, et al.*, 359 U.S. 236, 245. In other words, State and Federal courts are without power to act when a case is arguably subject to the Board's jurisdiction.

[24] *Syres* v. *Oil Workers International Union*, 350 U.S. 892. In this case, separate white and Negro locals had been jointly certified as bargaining representatives of employees in the appropriate unit. Subsequently, a consensual bargaining committee composed only of members of the white local negotiated a bargaining contract which provided for two separate lines of seniority on the basis of race, to the disadvantage of the Negro employees. Members of the Negro local sued the white local and the employer in Federal district court to enjoin enforcement of and obtain judgment declaring void the bargaining contract. The district court held that no Federal question was involved and dismissed the case. The circuit court, with Judge Rives dissenting, affirmed (223 F. 2d 739 (C.A.5)). The Supreme Court reversed the circuit court and remanded the case without delivering an opinion. "Since the Supreme Court reversed the circuit court without delivering an opinion or even hearing argument on the merits, there is no way of knowing whether the case is only a precedent for the principle that there is a statutory duty enforceable in a proper proceeding or for the proposition that an action at law may be maintained in the federal court." Cox, *supra*, p. 174, footnote 92. However, Judge Rives, in his dissent finding Federal jurisdiction, said there was no effective remedy before the Board. He stated (223 F. 2d at 747):

> There are no adequate remedies available to appellants under the National Labor Relations Act or through the Board. The National Labor Relations Act gives the Board power to remedy specific "unfair labor practices" as defined in said Act. Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedures [decertification] which would afford no adequate remedy in this case.

Recently in *Humphrey* v. *Moore*, 375 U.S. 335, 344, footnote 6, the Supreme Court had this to say about *Syres*:

> We note that in *Syres* v. *Oil Workers* . . . individual employees sued the exclusive agent and the company to enjoin and declare void a collective bargaining agreement alleged to violate the duty of fair representation. Dismissal in the trial court was affirmed in the Court of Appeals. This Court reversed and ordered further proceedings in the trial court in the face of contentions made both in this Court and the lower courts that the employees should have brought their proceedings before the National Labor Relations Board. Cf. *Cosmark* v. *Struthers Wells Corp.*, 194 A. 2d 325 . . . .

See also Mr. Justice Harlan's concurring opinion in the same case at pp. 377–378.

[25] See *Alexander* v. *Pacific Maritime Assn.*, 314 F. 2d 690, 692 (C.A. 9); *Durandetti* v. *Chrysler Corp.*, 195 F. Supp. 653, 655 (E.D. Mich.); *Todd* v. *Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill.), reversed as moot, 332 F. 2d 243 (C.A. 7), decided May 26, 1964; Note, "Administrative Enforcement of the Right to Fair Representation, The Miranda Case," *supra*. But see *Stout* v. *Construction & Gen. Laborers Dist. Council*, 226 F. Supp. 673 (N.D. Ill.).

[26] See *Humphrey* v. *Moore*, 375 U.S. 335, 344.

case, reaffirmed here, found a right to fair representation implied in Section 7 on the basis of the bargaining representative's implied duty of fair representation derived from its status as bargaining representative under Section 9.[27]

There are a number of reasons why this conclusion based on verbal logic does not, in our opinion, represent the intent of Congress, which is after all the goal of statutory construction.[28] Section 7 was part of the Wagner Act which in its unfair labor practice section was aimed only at employer conduct. The Wagner Act also contained the present Section 9(a). It hardly seems reasonable to infer, in these circumstances, that Section 7 contained a protected implied right to fair representation against the bargaining representative, when the entire Wagner Act did not make any conduct by a labor organization unlawful. Section 7 was continued substantially unchanged in the Taft-Hartley Act except for the addition of the "right to refrain" clause, which is not material to our problem. Although the Taft-Hartley Act added union unfair labor practices to the list of prohibited conduct, neither the Act nor the legislative history contains any mention of the duty of fair representation, despite the fact that the *Steele* and *Wallace* decisions were well known, having issued 3 years previously.[29] Again, although in the interval between the dates of the Taft-Hartley and Landrum-Griffin Acts, there were additional court decisions and articles by learned commentators in the law journals[30] dealing with the legal problems of fair representation, Congress made no change in the wording of Section 7, and ignored the problem completely in adding a "Bill of Rights" section to the existing statute. If Congress had really intended that violation of the duty of fair representation should be an unfair labor practice, it would seem that the 1959 revision afforded it an opportunity to clear up the uncertainty. Instead it remained silent. We do not believe that realistically this silence can be interpreted as in any way favorable to the contention that the right to fair representation is a protected Section 7 right. There are practical

[27] *Miranda Fuel Company, Inc.,* 140 NLRB 181, 184–185. For a more elaborate analysis of this logical argument, see Sovern, "Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda," New York University Sixteenth Annual Report on Labor (1963), pp. 10–13.

[28] *Flora v. United States,* 357 U.S. 63, 65.

[29] See Cox, *supra,* at 172.

[30] Cox's leading article, cited *supra,* appeared in 1957, 2 years before the passage of the Landrum-Griffin Act.

On May 5, 1953, Senator Ives for himself and Senators Smith, Aiken, Griswold, Purtell, Goldwater, Murray, Neely, Douglas, Lehman, and Kennedy introduced a bill to amend the National Labor Relations Act so as to make it an unfair labor practice for either an employer or a union to discriminate against an employee "on account of race, religion, color, national origin, or ancestry." The bill would also have made it an unfair labor practice for a labor organization to discriminate against or segregate any person otherwise eligible for membership "on account of race, religion, color, national origin, or ancestry." S. 1831, 83d Cong., 1st sess. The bill was referred to the Committee on Labor and Public Welfare, but was not reported out.

reasons for believing that, if there had been any contemporary understanding that the Act had made it an unfair labor practice for a union to fail in its duty of fair representation, the opposition would have been both strong and loud.[31]

There is another and more important reason why the Board should not undertake to police a union's administration of its duties without a clear mandate from Congress. The purpose of the Act is primarily to protect the organizational rights of employees. But apart from the obligation to bargain in good faith, "Congress intended that the parties would have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."[32] Before *Miranda*, it was assumed that contract or grievance decisions by employers and unions were immune from examination by the Board unless they were influenced by union considerations. But, under the underlying reasoning of the *Miranda* majority and that of the present decision, the Board is now constituted a tribunal to which every employee who feels aggrieved by a bargaining representative's action, whether in contract negotiations or in grievance handling, may appeal, regardless of whether the decision

[31] See, e.g., the statement of Senator Johnston of South Carolina opposing the 1959 McClellan "Bill of Rights" amendment. Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 (Government Printing Office), p. 1223.

During oral argument in the Supreme Court on the constitutionality of the Colorado Anti-Discrimination Law, *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714, Mr. Justice Goldberg remarked apropos the suggestion that the Civil Aeronautics Act or the Railway Labor Act might have created rights against racial discrimination in employment (31 L.W. 3314):

> In light of Congress' difficulties in passing a federal fair employment practice law, isn't it stretching it to say that Congress put such language into the Civil Aeronautics Act?

This remark is equally applicable to a similar interpretation of the National Labor Relations Act.

Moreover, opposition to such interpretation might have been expected to come not only from the opponents of civil rights and fair employment legislation, but from some of the strongest friends of such legislation. In its *amicus* brief to the court of appeals urging reversal of the Board's *Miranda* decision, the AFL–CIO said (pp. 2–3):

> The AFL–CIO accepts the proposition that a labor organization serving as exclusive bargaining agent has a duty to represent all the employees in the bargaining unit fairly and impartially. This duty has been enforced by the courts, and the Federation does not quarrel with the decisions upholding judicial enforceability. Furthermore, as to one of the most pernicious types of discrimination in employment, that based on race or color, the AFL–CIO has for years been asking Congress for effective legislation to guarantee Negroes fair employment opportunities.
>
> Nevertheless, the AFL–CIO is also firmly of the opinion that, however well-intentioned the effort, in the long run more harm than good would come from twisting the National Labor Relations Act so as to commit to the Federal Labor Board a task far different from the specific role assigned it by Congress. The integrity of the law demands that the NLRB do the job the statute gave it, and no other. And the practicalities of effectuating the recognized statutory purposes likewise dictate . . . that the Labor Board not embark on the vast undertaking of trying to police the substantive bargaining arrangements of the nation's unions and employers.

[32] *N.L.R.B.* v. *Insurance Agents' International Union, AFL–CIO (Prudential Ins. Co.)*, 361 U.S. 477, 488.

has been influenced in whole or in part by considerations of union membership, loyalty, or activity. The Board must determine on such appeal, without statutory standards, whether the representative's decision was motivated by "unfair or irrelevant or invidious" [33] considerations and therefore to be set aside, or was within the "wide range of reasonableness . . . allowed a statutory representative in serving the unit it represents . . ." [34] and to be sustained. Inevitably, the Board will have to sit in judgment on the substantive matters of collective bargaining, the very thing the Supreme Court has said the Board must not do, and in which it has no special experience or competence. This is not exaggeration. The duty of fair representation covers more than racial discrimination. *Miranda* itself did not involve a race issue and since *Miranda*, the Board has had to decide a number of other cases where allegations of violation of the duty of fair representation rested on other than racial grounds,[35] with many more such cases disposed of at the regional level. *Miranda* means that the Board is embarking on a wholly new field of activity for which it has had no preparation, and which is likely seriously to interfere with its present activities that are already more than enough to keep it fully occupied.

What we are confronted with is an important question of policy which should be resolved not by logomachy, but by a careful weighing of alternatives in the light of the ends to be achieved. Where specific statutory rights or prohibitions are not involved, should enforcement of the duty of fair representation be left to the courts, to the Board, or both? In such circumstances, should cases of breach of this duty insofar as they involve race discrimination be treated differently from breaches involving nonracial factors? If a separate agency is created to handle the task of eliminating employment discrimination by unions and employers based on race, should the Board have a duty in this field? If so, what should it be? To ask these questions is to appreciate that the problem with which we are presented is legislative to be resolved by the Congress and not by an administrative body whose duty it is only to administer the law which Congress has written

Accordingly, we would rest our finding of a violation of 8(b)(1)(A) not on nonperformance of the duty of fair representation, but on those other considerations present in this case which Congress brought within the unfair labor practice ambit of the statute.

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[33] *Miranda Fuel Company, Inc., supra,* at 185.

[34] *Ford Motor Company* v. *Huffman,* 345 U.S. 330, 338.

[35] *Houston Typographical Union No. 87, International Typographical Union, AFL–CIO (Houston Chronicle Publishing Company)*, 145 NLRB 1657; *Armored Car Chauffeurs and Guards Local Union No. 820, etc. (United States Trucking Corporation)*, 145 NLRB 225; *New York Typographical Union Number Six, etc. (New York Times Company)*, 144 NLRB 1555; *Millwrights' Local Union 1102, etc. (Planet Corporation)*, 144 NLRB 798.

III.

As we indicated previously, we do not believe that there are 8(b)(2) and (3) issues properly before the Board. But even if we are wrong in this belief, we would be constrained to disagree with the majority's basis for holding that Respondent's refusal to process the grievance on behalf of Ivory Davis was a violation of Section 8(b)(2) and (3) of the Act.

In our dissent in *Miranda*, we expressed the view that 8(b)(2) outlaws only discrimination related to "union membership, loyalty, the acknowledgment of union authority or the performance of union obligations." [36] This position was endorsed by a majority holding of the court of appeals in reversing the Board decision in *Miranda*.[37] We adhere to that view.

In the present case, the only unfair labor practice alleged is the failure of Respondent Union to process Ivory Davis' grievance. As both the Trial Examiner and the majority admit, the General Counsel did not affirmatively put in issue the legality of the collective-bargaining contract between Hughes Tool and Respondent Union. We cannot perceive how the mere refusal to process a grievance on behalf of an employee, unaccompanied by any request to or demand upon the employer and not based on a contract itself alleged to be violative of Section 8(b)(2) of the Act can be said to "cause to attempt to cause" [38] an employer to do anything, much less to discriminate against an employee in violation of Section 8(a)(3).[39] Another case would be presented if the majority's theory were based upon the Union's refusal to process the grievance pursuant to a bargaining contract itself violative of Section 8(b)(2) or the fact that Respondent Union had in some other way caused or attempted to cause the Company to discriminate against Davis for reasons related to union membership or activity.[40]

IV.

The majority has adopted the Trial Examiner's finding that Respondent Union's refusal to process Ivory Davis' grievance also violated Section 8(b)(3).[41] It seems to us that Section 8(b)(3) prescribes a duty owed by a union to employers and not to employees.

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[36] *Miranda Fuel Company, Inc.*, 140 NLRB 181, 197.

[37] *N.L.R.B.* v. *Miranda Fuel Co., Inc.*, 326 F. 2d 172 (C.A. 2).

[38] Section 8(b)(2) forbids a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ."

[39] *Melvin Rupp, d/b/a Rupp Equipment Company*, 112 NLRB 1313, 1317; *Salt River Valley Water Users Association, an Arizona Corporation*, 99 NLRB 849, 855, enfd. as modified 206 F. 2d 325 (C.A. 9). See Sovern, "The National Labor Relations Act and Racial Discrimination," 62 Colum. L. Rev. 563, 587–588.

[40] See *N.L.R.B.* v. *Gaynor News Company, Inc., supra.*

[41] This section declares it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)."

Section 8(b)(3) itself speaks of refusing "to bargain collectively with an *employer* . . . ." Section 8(d), which defines the duty to bargain collectively, refers to the "*mutual obligation of the employer and the representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours . . . or the negotiation of an agreement . . . and the execution of a written contract . . . but such obligation does not compel *either party* to agree to a proposal or require the making of a concession. . . ." In a proviso, Section 8(d) refers to the steps a "*party to such contract*" must take in order to terminate or modify an existing contract. [Emphasis supplied.]

As Professor Sovern has said in criticizing the view [42] that violation of the duty of fair representation may be a violation of 8(b)(3): [43]

> The difficulty with this view is that the context in which the words "confer in good faith" appear gives repeated evidence of concern with the duties of employer and union to each other, but no evidence at all of concern with the duty of unions to those they represent. For one thing . . . the statute speaks of the "mutual obligation of the employer and the representative of the employees," thereby implying that obligations to others are not the subject of this provision. For another, the duty to "confer in good faith" is imposed upon employers and unions alike. On its face, then, it imports comparable obligations, and, of course, an employer can have no obligation comparable to the duty of fair representation. That the duty of unions to bargain collectively was intended merely to parallel that of employers is also suggested by the fact that 8(b)(3), which imposes the duty on unions, was added to the National Labor Relations Act as an obvious counterpart to Section 8(a)(5), which imposes it on employers. The duty to bargain collectively, then, probably does not include the duty to represent fairly.

The legislative history of Section 8(b)(3) shows conclusively that this section was intended to be a counterpart of Section 8(a)(5), and under the latter the bargaining duty is owed entirely to the union.[44] Thus the House report on the proposal which became 8(b)(3) said: "The standards and definitions which have been discussed in relation to Section 2(11) apply in the case of unions, as well as in the case of

[42] See Cox, *supra*, at 173.

[43] Sovern, "The National Labor Relations Act and Racial Discrimination," *supra*, at 588–589.

[44] The Trial Examiner cited *Louisville Refining Company*, 4 NLRB 844, 860–861, for the proposition that the employer's duty to bargain runs both to the union and the employees. We do not agree with this interpretation of the cited case. All that case decides is that an employer must bargain with the majority representative for all employees in the unit "even though the union does not ask for recognition, in writing, of its right to act as the exclusive representative of all employees in the appropriate unit." The case is concerned with the duty owed the union and not the employees.

employers. The duty to bargain now becomes mutual. This, the committee believes, will promote equality and responsibility in bargaining."[45] Similarly, the House conference report commenting on 8(b)(3) said: "This provision . . . imposed upon labor organizations the same duty to bargain which under Section 8(a)(5) . . . was imposed on employers."[46] The same understanding is reflected by the Supreme Court as the following quotation from the *Insurance Agents'* case[47] shows:

> It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. . . . Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. The main-stream of cases before the Board . . . under the provisions fixing the duty to bargain collectively, is concerned with insuring that the parties approach the bargaining table with this attitude.

Except for a single isolated statement by Representative Hartley, referred to in the *amicus* brief of the American Civil Liberties Union, there is no evidence that Congress intended that violation of the duty of fair representation should be an unfair labor practice under Section 8(b)(3). This statement, even assuming that it has the meaning attributed to it in the *amicus* brief,[48] is certainly not sufficient to offset the language of the statute and the overwhelming burden of the legislative history.

We conclude that the General Counsel has not established that Respondent has violated Section 8(b)(2) or (3). We would not, therefore, adopt these findings of the Trial Examiner.

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[45] H. Rept. 245, 80th Cong., 1st sess. 31 (1947).
[46] H. Rept. 510, 80th Cong., 1st sess. 43 (1947).
[47] *N.L.R.B.* v. *Insurance Agents' International Union, AFL–CIO*, 361 U.S. 477, 488.
[48] But see *N.L.R.B.* v. *Miranda Fuel Co., Inc.*, 326 F. 2d 172, 178 (C.A. 2).

INTERMEDIATE REPORT, RECOMMENDED ORDER, AND RECOMMENDATIONS

STATEMENT OF THE CASE

On October 18, 1961, the Board in Case No. 23–RC–1758 (herein called the representation case) certified Independent Metal Workers Union, Local No. 1, and Independent Metal Workers Union, Local No. 2 (herein called Local 1 and Local 2, respectively), to act jointly as the exclusive bargaining representative of the employees of Hughes Tool Company (herein called the Company) in an appropriate unit. Case No. 23–CB–429 (herein called the unfair labor practice case) originated on May 23, 1962, when Local 2 filed a charge against Local 1 alleging that the latter had violated Section 8(b)(1)(A) of the Act by refusing to process grievances on behalf of certain members of Local 2. The complaint in that proceeding, issued on

August 31, 1962, alleges that Local 1 violated Section 8(b)(1)(A) of the Act by refusing to process a grievance filed by one Ivory Davis with respect to the Company's denial of his bid to participate in an apprenticeship program. Local 1 filed its answer on September 12, 1962, admitting the refusal to process Davis' grievance, but denying that such refusal violated the Act.

On October 25, 1962, after issue had thus been joined in the unfair labor practice case, but before the matter came on for hearing, Local 2 (and its president and treasurer, acting in their official capacities and as individuals) filed with the Board a motion to rescind the certification of October 18, 1961, on the ground that Local 1 had refused to represent fairly the Negro employees in the bargaining unit and had discriminated against those employees because of their race. By direction of the Board, this matter was consolidated with the unfair labor practice proceeding for purposes of hearing, and the Trial Examiner was directed to include in his report relevant findings, conclusions, and recommendations relating to both proceedings.

The matter, thus consolidated, was heard at Houston, Texas, on December 11 and 12, 1962. In the unfair labor practice proceeding, appearances were entered on behalf of the Charging Party, the Respondent, and the General Counsel. In the representation proceeding, appearances were entered by the original petitioner, United Steelworkers of America, AFL–CIO (herein called the Steelworkers), by the Company, and by Locals 1 and 2, who in the original representation proceeding had been joint intervenors but who now entered separate appearances as parties adverse to each other.

On December 17, 1962, Local 1 filed a motion with the Board (thereby superseding a motion to similar effect made orally at the close of the hearing) to amend the certification so that the name of the certified bargaining agent would appear as "Independent Metal Workers Union, Local 1," urging that Locals 1 and 2 had merged. This motion was duly referred to the Trial Examiner and is disposed of below.[1] On January 18, 1963, counsel for Local 1 filed a document in the name of Independent Metal Workers Union, asking that the record be reopened to adduce evidence. This matter is discussed further under the section entitled "E. *Posthearing developments," infra.* Thereafter briefs were received from General Counsel, Local 1, and Local 2, and have been fully considered.

Upon my observation of the witnesses and on the entire record, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATIONS INVOLVED

Hughes Tool Company is engaged at Houston, Texas, in the manufacture of oil drilling equipment, and annually ships over $500,000 worth of products to points outside the State of Texas. The Company is engaged in commerce within the meaning of the Act. Local 1, Local 2, and the Steelworkers are labor organizations within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE AND THE BASIS FOR THE MOTION TO RESCIND

A. *Background*

In the history of labor relations at the Company's plant—which history is touched on in the record before me, and is further detailed in various Board decisions concerning this Company [2]—one fact has remained constant from before the enactment of the Wagner Act to the hearing in this case: all jobs at the plant were either "white men's jobs" or "Negro jobs," and any job available to a member of one race was unavailable to a member of the other. While some jobs shifted during the years from one racial category into the other, at all times—at least since 1928—the jobs have been segregated, i.e., available to a particular employee or not available to him, depending upon his race. The record further establishes that Independent Metal Workers Union, Locals 1 and 2, came into existence in 1941 following the disestablishment, pursuant to Board Order, of two labor organizations, found to have been company-dominated (Employees Welfare Organization and Hughes Tool Colored Club), and that from their inception until after the issuance of the

[1] On my own motion, I herewith admit the document into evidence as Trial Examiner's Exhibit No. 1.

[2] See 27 NLRB 836, 33 NLRB 1089, 36 NLRB 904, 45 NLRB 821, 53 NLRB 547, 56 NLRB 981 (modified 147 F. 2d 69 (C.A. 5)), 69 NLRB 294, 77 NLRB 1193, 85 NLRB 663, 88 NLRB 1039, 97 NLRB 1107, 100 NLRB 208, 104 NLRB 318, and 119 NLRB 739.

complaint in this case membership in Local 1 was available only to white employees of the Company while membership in Local 2 was confined exclusively to colored employees. Independent Metal Workers Union, Locals 1 and 2, competed in various Board-conducted elections during the two following decades with other labor organizations, and at one time were supplanted as the statutory bargaining representative by the Steelworkers. During the period of the Steelworkers' incumbency, according to uncontradicted testimony in the record, it also maintained a white local and a colored local, and entered into contracts with the Company providing for exclusively white jobs and exclusively Negro jobs.

This pattern of racial segregation among the employees, both in their jobs and in their unions, was well known to the National Labor Relations Board. See *Hughes Tool Co.*, 33 NLRB 1089, 1091, 1096–1099; 77 NLRB 1193, 1197, footnote 7; 104 NLRB 318, 319. With respect to segregated jobs and segregated locals, the record establishes that on occasion Negro employees have benefited from the segregation in jobs in the sense that white employees have been laid off notwithstanding their seniority over retained Negro employees, that the Negro employees constituted a minority (less than one-fourth) of the bargaining unit, and that the creation of two separate locals had been "at the suggestion and insistence of the colored men" who "wanted to be independent of [the white employees] as far as certain functions were concerned" and "didn't want [the white employees] to dominate their business." This attitude of 1941 appears to have changed during the intervening two decades and in its motion to rescind the certification, filed October 24, 1962, Local 2 urges that no union may be certified "if it is composed of separate locals based on race and color . . . ." Indeed, within 6 weeks after the 1961 certification, Local 2 made its initial overt efforts toward elimination of segregation in jobs. We turn, therefore, to a consideration of these steps and other events surrounding the negotiation of a contract in 1961.

B. *The 1961 negotiations*

At the time of the 1961 certification of Locals 1 and 2 as joint bargaining representatives, they and the Company were operating under an agreement effective September 15, 1959, which provided, *inter alia*, that the agreement would remain in effect for 2 years, that it would continue from year to year thereafter unless terminated as therein provided, that it would be open to amendment at stated intervals, and that in the event of notice to amend, its terms would continue in effect until accord had been reached on amendments or until it was terminated. This agreement covered two groups of jobs designated in the agreement by Roman numerals I and II. Group I jobs were open only to white employees; group II jobs were open only to Negroes. The contract referred to "employees represented by Local No. 1," meaning white employees, and to employees "represented by Local No. 2," meaning Negro employees. Separate lines of progression and demotion were established in that employees could not be promoted or demoted from group I to group II jobs or vice versa. With respect to employees represented by Local 1, the contract provided that when a reduction in force resulted in layoff of more than 25 men in a calendar month, the Company would establish a "labor pool" in which men demoted out of their own department would be reassigned to jobs or laid off in a plant seniority basis. With respect to employees represented by Local 2, the contract provided that employees scheduled for layoff would be considered for employment, if their plant seniority warranted, at the lowest labor grade in the general machine shop or in the general maintenance unit.

The procedure of the two locals in negotiating their agreement with the Company was for each to prepare proposals and, before going into negotiations with management, to hold a joint meeting at which they examined each other's proposals and decided which ones to submit to management. This procedure was followed in negotiations late in 1961 looking to amendments of the 1959 contract. Although negotiations were somewhat delayed by the then pending representation case, after the issuance of the certification on October 18, 1961, Locals 1 and 2 met and agreed on most of the matters to be presented to management.

The sole area of disagreement, at least prior to the latter part of November, concerned the foundry. The foundry had been considered part of the unit in the 1959 contract, which made provision for both group I and group II (i.e., white and Negro) jobs there. Apparently, however, the foundry had been inoperative for some time, and in 1961 Local 2 urged that the Company be asked to reactivate it. At Local 1's suggestion, however, the foundry matter was passed over in the expectation (later realized) that the Company would take the initiative on that issue.

Late in November 1961, Local 2 raised with Local 1 a further issue—the elimination of racial discrimination in job opportunities in the unit. When L. A. Ashley,

president of Local 2, raised the issue, representatives of Local 1 replied that they would like to see a written proposal on the subject. On December 14, 1961, Local 2 presented the following proposal to Local 1:

> The Parties, Locals 1 and 2, herein agree that part one and part two of the current contract has created in its interpretation a problem between the Locals as to advancement opportunities for all employees.
>
> Therefore the Parties agree that they will within a period of two years or sooner correct the above matter, and provide a greater and more equitable opportunities for all employees.

Local 1 took the position that this proposal came too late in the bargaining to be presented to the Company, as the two locals had previously presented a package of 23 proposals on which negotiations were nearly completed. President Everitt of Local 1 offered to discuss with Local 2 at a later time proposals looking toward elimination of segregation in job opportunities, and, as developed below, such discussions eventually occurred. The proposal quoted above was, therefore, not formally presented to the Company, as the two locals had not come to agreement on it, although there is evidence that the Company's director of industrial relations had a copy and told the president of Local 2 that the dispute between the two locals was their "own business" to "clean up" among themselves.

On December 18, 1961, the Company and Local 1 executed a document "amending and extending" the 1959 contract. Among other changes, the new agreement eliminated the foundry from the "units" covered by the contract and provided that a separate contract would be executed to cover the foundry which would be "completely separate with no relation to the present production and maintenance unit." The new agreement provided also for certain changes in wage rates, in the seniority system, in holiday pay, and in certain other matters. Local 2, however, refused to join in executing this agreement because Local 2 was, as its president testified, "in negotiations with Local 1 to try to put some language in the contract that would abolish segregation and discrimination because of race, creed or color." Notwithstanding Local 2's failure to execute it, the Company put the December 18, 1961, agreement into effect, and Local 2 promptly protested the Company's action in so doing.

Also on December 18, 1961, the Company and Local 1 executed an agreement to enlarge the number of apprentices by adding three crafts to the apprenticeships in the plant, and setting forth the wage rates to be paid to, and the tasks to be performed by, the apprentices. Unlike the general amendment to the 1959 agreement, executed by the Company and Local 1 on the same date, this agreement for apprentices did not contain any space for signature by Local 2. The proposed apprenticeships had been discussed during the bargaining negotiations, and representatives of both Local 2 and Local 1 had been present. Those present were aware that the proposed apprenticeships would fall in grade I, i.e., would be available to white but not to Negro employees.

C. The apprenticeships, Davis' unsuccessful bid, and his effort to press his grievance

In mid-February 1962 [3] the Company posted a notice inviting applications or "bids" for six apprenticeships "in the Tool and Die Unit I." Although the Roman numeral in the notice, as well as the previous discussions during the contract negotiations, signified that the apprenticeships were not open to Negroes, Ivory Davis, a Negro who had been in the Company's employ since 1942, and who was treasurer of Local 2, bid for an apprenticeship. About 1 week later, L. A. Ashley, president of Local 2, saw a company-prepared list of employees who had bid for such apprenticeships, which list did not include Davis' name. The grievance committee of Local 2 thereupon discussed the matter with company officials, who advised the committee that the Company was following its contract with the Independent Metal Workers Union. In an ensuing exchange of correspondence, Local 2 asked the Company whether Davis' bid was being accepted or rejected, and, if the latter, whether the rejection was based on his race, his qualifications, or his union membership. The Company replied that it would follow the 1959 contract and its amendments, and would consider all "eligible" employees.

On April 17, Davis, having heard nothing further from the Company, wrote T. B. Everitt, president of Local 1, advising Everitt that Davis' bid for the apprenticeship had been denied, and requesting "that Local No. 1 intercede in representing [Davis]

[3] Unless otherwise noted, all events mentioned in this and section D, *infra*, transpired in 1962.

in this matter." This letter was unanswered. One month later the charge was filed in this proceeding alleging that Local 1's refusal to process grievances on behalf of Davis and Ashley violated Section 8(b)(1)(A) of the Act.

In addition to Davis, some 70-odd employees, all white men, submitted bids for the apprenticeships. Six were selected, each of whom at some previous time had been employed in the tool and die unit and had return rights there under the 1959 contract and any amendments thereto.

D. *Further relations between Locals 1 and 2 relevant to segregation in jobs and segregated unions, up to the time of the hearing*

As noted above, Local 1 had suggested that Local 2's proposal for the elimination of job segregation, advanced during the negotiations late in 1961, be discussed at a later time. In the latter part of March, Local 1 proposed that the two locals submit to the Company a proposed amendment to the contract reciting that "The parties agree that they will, within a period of two (2) years or sooner, attempt to provide a greater and more equitable opportunity for all employees." Local 2 found the language objectionably weak in its use of the word "attempt," and the matter was dropped.

On October 9, the Company posted a notice that it had reached an agreement to work on contracts for the United States Government and that a condition of such contracts was the posting and carrying out of a policy of nondiscrimination in employment practices, including, *inter alia*, training and apprenticeships. On October 18, Local 1 issued a bulletin to all employees reciting that it had received a number of inquiries concerning the Company's notice of October 9, that Local 1 would expect the Company to honor the existing agreement between them with respect to employment opportunities, and that Local 1 contemplated no changes in the contract in that respect. As indicated below, however, Local 1 reversed its position within the next 2 weeks.

On October 25, Local 2 and two of its officers (Ashley and Davis) filed the motion to rescind the certification, which ran jointly to Locals 1 and 2, alleging that the practices of Local 1 in discriminating against Negroes and the existence of segregated locals rendered the certification invalid. In an exchange of correspondence among the officers and counsel of both locals dating from October 26 to November 27 (i.e., up to only 2 weeks before the hearing), Local 1 offered to merge with Local 2 and to ask the Company to negotiate amendments to the contract eliminating all provisions which required discrimination on the basis of race or color. Representatives of the two locals met and drafted a new constitution and bylaws for the proposed merged union.

The proposed new bylaws, in providing for various committees, specified that on certain committees a specific number of the members would be white and a specific number colored (e.g., three of each on the legislative and information committee; five white and three colored members on the grievance committee; etc.), but in no other respect did the proposed constitution and bylaws refer to, or make special provision for, any particular race or color. These proposals apparently were satisfactory to the members of Local 2, subject to the approval of their counsel, who has refused to give his approval until the issues in this case shall have been decided by the Board.[4] Nevertheless, some of the provisions of the proposed new constitution and bylaws have been given effect because the record shows that a joint grievance committee, composed of both colored and white employees, met with the Company during the week preceding the hearing. Also, the president of Local 1 testified that Local 1 would now accept Negroes into membership upon their application. He further

[4] The provisions guaranteeing a specified number of Negroes on certain committees were apparently inserted in response to the suggestion of counsel for Local 2, in his letter of November 9 to counsel for Local 1, that Negroes be assured of representation "at the policy making and administrative levels of the merged Union as well as on [certain] committees." When the Trial Examiner suggested that provisions specifying the number of Negroes and whites on certain committees might be legally objectionable, counsel for Local 1 stated that, if so, Local 1 would be agreeable to rewriting those provisions "to eliminate any reference to white or colored" or to specify whatever jobs Local 2 might wish to designate as being represented on committee "so long as it would not change the proportions now set forth." Later, counsel for Local 2 suggested in his brief that the question raised by the Trial Examiner is outside the area of the Board's responsibilities. Without necessarily agreeing with that observation, I conclude that I need not pass on the issue in this case.

testified that even in the event that Local 2 should not merge with Local 1, Local 1 would ask the Company to remove from the contract the provisions which require racial discrimination.

E. *Posthearing developments*

As noted above, on January 18, 1963, counsel for Local 1 filed a motion to reopen the record together with a supporting affidavit, alleging in substance that on January 14, 1963, the "Independent Metal Workers Union" and the Company had signed an "amendment to contract of September 15, 1959, as amended and extended December 18, 1961, to eliminate discrimination because of race, creed, color, or national origin." The motion alleges that "all references to Locals No. 1 and No. 2 have been stricken from the amended contract, and all union committees negotiate and represent the bargaining unit under the title of the Independent Metal Workers Union. These union committees are composed of members previously represented by Locals No. 1 and No. 2." The motion further recites that the amended contract was ratified at a membership meeting of the Independent Metal Workers Union on January 12, 1963, that the meeting was attended by 168 members, of whom 65 were members previously represented by Local No. 2, including Ashley and Davis, and that those 65 members all voted for ratification of the contract. The total vote on ratification, according to the motion, was 102 for, 23 opposed, 43 not voting. On January 28, 1963, I issued an order directing the parties to file with me a "Statement of Position" setting forth their respective views on the facts contained in the motion to reopen and on various isuses posed thereby, and such statements were duly filed by General Counsel and by Local 2.[5]

The responses to the motion to reopen, read together with the briefs, substantially confirm the facts set forth in the motion with respect to the new contract. The response of Local 2 and the brief of Local 1 further establish that Columbus Henry has succeeded L. A. Ashley as president of Local 2, and that Henry signed the new agreement on January 23, 1963. According to Local 2, it has not merged with Local 1, it is still a separate entity, and Henry signed as its new president. According to Local 1, Henry signed "on behalf of the Negro employees."

The responses to my order of January 28 further confirm that on December 13, 1962, well before the negotiation and signing of the new "non-discriminatory" contract, the Steelworkers filed a new petition for certification, Case No. 23–RC–2011, covering the identical employee unit which is involved in the instant proceeding.

As no substantial dispute of fact exists with respect to these posthearing events, I see no reason to take additional testimony, and to that extent the motion to reopen the record is hereby denied. I regard the posthearing facts as relevant to the proceeding, and, as indicated above, I am admitting the pertinent papers into evidence. To that extent, the motion to reopen is hereby granted.

F. *Concluding findings*

As the foregoing discussion indicates, this case presents questions concerning the impact of the National Labor Relations Act on labor organizations which are themselves segregated on racial grounds or which execute collective-bargaining agreements which provide for racially segregated jobs and racially segregated lines of promotion and demotion. In my view, analysis of this problem can best begin with a consideration of the obligations imposed on a union by its assumption of the role of exclusive bargaining representative. For this reason we turn first to the issues raised by the motion to rescind the certification, and thereafter to those involved in the unfair labor practice case.

1. The certification

a. *Unfair representation in bargaining*

An exclusive bargaining representative, whether certified or not, is, of course, under a statutory duty to bargain on behalf of all the employees within the bargaining unit, and to represent them fairly and without discriminating among them because of their union membership or lack thereof. As I read the decisions in *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, and *Syres* v. *Oil Workers*, 350 U.S. 892, reversing 223 F. 2d 739 (C.A. 5), the statute also requires that the bargaining rep-

[5] To facilitate further reference thereto, the motion to reopen and attached materials are hereby incorporated into the record as Trial Examiner's Exhibit No 2; my order of January 28 is similarly made part of the record as Trial Examiner's Exhibit No. 3; and General Counsel's and Local 2's responses thereto are made part of the record as Trial Examiner's Exhibits Nos. 4 and 5, respectively.

resentative not discriminate against employees within the unit because of their race or color. Putting aside the question whether other remedies may be invoked against an exclusive bargaining representative which violates these statutory duties (among other possibilities may be mentioned unfair labor practice proceedings, private suits to compel performance of statutory duties and to enjoin misperformance, and complete loss of status as bargaining representative so as to privilege what would otherwise be an employer's unlawful refusal to recognize), there can be no doubt that where such a defaulting exclusive representative enjoys the status of Board certificaiton, the Board may, should, and will revoke the certification. See, e.g., *Pioneer Bus Company, Inc.*, 140 NLRB 54; *Carter Manufacturing Company*, 59 NLRB 804; *A. O. Smith Corporation, Kankakee Works*, 119 NLRB 621.

In the instant case, as shown above, Local 1, purporting to act as a certified bargaining representative, entered into an agreement with the Company in December 1961 (and threatened as late as October 1962 to enforce it) under which certain jobs in the bargaining unit were open only to white employees and others were open only to Negroes. This action by Local 1 may be viewed as dividing the certified unit into two units, one for white and one for Negro employees, or it may be viewed as discrimination within a single unit based on race and color. In either view, the action violates the statutory duty of an exclusive representative and hence warrants rescission of the certification. It is, of course, immaterial that Local 2 on earlier occasions was equally guilty of conduct which rendered its certification subject to revocation, for—even apart from the fact that Local 2 refused in 1961 to join in perpetuating the illegality—the Board may act to police its own certifications. Nor is the illegality cured by the fact that separate locals administered the two units or two sections of the same unit, because whatever arrangements may be worked out between the recipients of a joint certification in jointly acting as statutory bargaining representative, they must observe the same legal duties imposed on a single representative with respect to full and fair representation of the unit. See *Allied Chemical & Dye Corporation, Nitrogen Division*, 120 NLRB 63, 69. Finally, whatever may be said or thought with respect to the Board's past acquiescence in the practices here discussed,[6] it is clear that the Board is not estopped by its prior actions and is not required to tolerate illegal conduct in the future merely because it has not seen fit to act heretofore. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *United States* v. *San Francisco*, 310 U.S. 16, 31–32; *N.L.R.B.* v. *Baltimore Transit Company, et al.*, 140 F. 2d 51, 54–55 (C.A. 4), cert. denied 321 U.S. 795.

b. *Unfair representation in membership policies*

What has been said should suffice to establish that the certification of October 18, 1961, is vulnerable to the motion to rescind. That motion, however, urges as an additional ground for rescission the policy of Local 1 (at the time the motion was made) of refusing to admit Negroes to membership, and the movants urge that a union which so discriminates should not be permitted to obtain or retain a Board certification. Although the record shows that Local 1 has since abandoned the practice of excluding Negroes from membership, the record is silent as to the present practices of the Steelworkers and contains uncontradicted evidence that when the Steelworkers was the bargaining representative it "had a white local and a colored local." As appears above, the Steelworkers recently filed a new petition and is currently competing for the employees' votes. Under these circumstances I believe it appropriate, in framing my recommendations with respect to the issues involved in the reopened representation proceeding, to address myself to the argument raised in the motion to rescind that no bargaining agent may be certified if it is composed of separate locals based on race or color, or if it refuses to admit Negroes to full membership.

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[6] See, e.g., the comment in Aaron and Komaroff, "Statutory Regulation of Internal Union Affairs, I," 44 Ill. L.R. 425, 445, that with respect to racial discrimination on the part of unions, the Board has erected a "facade of lofty sentiments" but its record is one of "distinctly minor achievement, characterized by numerous temporizations with seemingly basic principles of democracy." See also Professor Wellington's observation that the Board "has sometimes paid lip service to the principles of *Steele* . . . . But it has done no more than this," "Union Democracy and Fair Representation," 67 Yale L.J. 1327, 1328, footnote 63. Accord: Hewitt, "The Right to Membership in a Labor Union," 99 U. Penna. L.R. 919, 944: ". . . by its failure to recognize the inherent dangers of segregation, the Board has chosen to adhere to verbal theory rather than realistic solutions."

Early authority on the question of a union's right to bar applicants from membership upheld such right on the theory that a union was a private association, like a social club, whose membership policies were its own affair. This rationale, and holdings based thereon, cannot be viewed as persuaisve in the light of current realities. A social club exercises no direct authority over the working or living or social conditions of nonmembers beyond that which is inherent in the fact of nonmembership itself, but a labor organization upon achieving majority status in an appropriate unit becomes the bargaining representative of nonmembers in the unit and, by the contracts it executes and administers, has profound and far-reaching impact on their wages and other conditions of employment. To be sure, the bargaining representative is forbidden to negotiate contracts which are more favorable to members than nonmembers (in itself an indication that the analogy to private associations is faulty). But the interest of nonmembers is not limited to protection against such discrimination. The bargaining representative makes contracts, handles grievances, and calls strikes—all matters which profoundly affect the nonmember (who has no voice in the bargaining representative's decision or in the selection of those who make the decision) in ways far more direct than any that can be remotely envisaged by his exclusion from a private club.

Such considerations of a union's activities underlie the Supreme Court's observation in *Steele, supra,* 323 U.S. at 202, and *A.C.A.* v. *Douds,* 339 U.S. 382, 401-402, that statutory bargaining representatives enjoy powers in some respects comparable to those of legislative bodies. This is not to say that the constitutional restrictions on legislative bodies are necessarily applicable to bargaining representatives. But, because the bargaining representative is under a duty to accord fair representation to all members of the bargaining unit, it is appropriate to inquire (free from any illusion that we are dealing with a mere private club) whether such fair representation is accorded employees who are ineligible for, or segregated in, membership in the bargaining agent because of race or color.

As a theoretical matter, and also in the light of practical experience, it would appear that a union which excludes applicants from membership or segregates them because of race or color is not extending fair representation to the excluded class. A union's deliberate exclusion of a class from full membership itself suggests that discrimination against the members of the class is contemplated. Moreover, exclusion from full membership and hence from the right to participate fully in union affairs necessarily tends to result in lack of fair representation of the excluded class, whose members—denied a voice in the formulation of union policies and in the choice of union officers—are unable to place their wishes or views formally before their own representative. And authorities in the field indicate that what is thus theoretically suggested, and is further attested by the record in this case showing discrimination against Negroes in eligibility for apprenticeships, is substantiated by a host of other cases reflecting discrimination in contracts on the part of unions which discriminate with respect to membership. See, e.g., the cases collected by Professor Wellington in "The Constitution, the Labor Union, and Governmental Action," 70 Yale L.J. 345, 373, fn. 119, 120; see also Sovern, "The National Labor Relations Act and Racial Discrimination," 62 Columbia L.R. 563, 583, 598–604; Blumrosen, "Legal Protection against Exclusion from Union Activities," 22 Ohio St. L.J. 21, 25; Rauh, "Civil Rights and Liberties and Labor Unions," 8 Lab. L.J. 874, 875; Hewitt, "The Right to Membership in a Labor Union," 99 Penna, L.R. 919, 943.

What has been said with respect to unions which exclude Negroes is equally applicable, as the record here attests, to unions which place Negroes and white employees in separate locals. Such "separate but equal" treatment resulted in this case in Negroes being precluded from eligibility for the higher paid jobs and even training as apprentices. Similar results of "separate but equal" locals were condemned by the courts in *Betts* v. *Easley,* 161 Kan. 459, 169 P. 2d 831; *James* v. *Marinship Corp.,* 25 Cal. 2d 731, 155 P. 2d 329. See also, Sovern, *supra,* 62 Columbia L.R. at 602 and footnote 148. Assuming *arguendo* that the doctrine of "separate but equal" retains any vitality in this area, the record here shows that the separateness was accompanied by inequality. In any event, the same logic which led to the overruling of *Plessy* v. *Ferguson,* 163 U.S. 537, in *Brown* v. *Board of Education,* 347 U.S. 483—namely, that "separate but equal" in the area of race relations is self-contradictory and that separateness of itself both connotes and creates inequality—leads here to the conclusion that racial discrimination in membership in itself creates an inequality inconsistent with the bargaining agent's duty of fair representation.

I am, of course, aware of the dictum in *Steele* that a bargaining representative has "the right to determine eligibility to its membership . . . ," 323 U.S. at 204. One

may well question whether this statement was intended to embrace the very racial discrimination which the Court itself termed "obviously irrelevant and invidious." 323 U.S. at 203. In any event, the dictum expressed in the *Steele* case on this issue should be considered in the light of the Court's more recent decisions in racial matters, including the overruling of *Plessy*. Indeed, if the *Steele* dictum had been controlling, the Court would have had no occasion to take the unusual step of noting that it denied certiorari in *Oliphant* v. *Brotherhood of Locomotive Firemen,* 262 F. 2d 359 (C.A. 6), cert. denied 359 U.S. 935, "in view of the abstract context in which the questions sought to be raised are presented on this record." In *Oliphant*, the Sixth Circuit declined to compel a union to admit a Negro applicant, observing that the union was "a private association, whose membership policies are its own affair . . ." 262 F. 2d at 363. I find more persuasive reasoning in *Betts* v. *Easley,* 116 Kan. 459 P. 2d 831 (holding in effect that the bargaining representative should either admit Negroes or cease to be the bargaining representative); in *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 735, 155 P. 2d 329, 337, where the California Supreme Court observed, "It is difficult to see how a union can fairly represent *all* the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in union policies"; in Judge Groner's concurrence in *Brotherhood* v. *United Transport Service Employees,* 137 F. 2d 817, 820 (C.A.D.C.), reversed on other grounds 320 U.S. 715; and in the dissent of Justice Fairchild in *Ross* v. *Ebert,* 275 Wis. 532, 82 N.W. 2d 315, 320 (a case not involving a statutory bargaining representative).

Finally, I am, of course, aware of the proviso to Section 8(b)(1)(A) stating "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." But this proviso goes only to the Union's freedom from liability under Section 8(b)(1)(A), and sheds no light on its right to representative status or certified status under Section 9.[7] In this connection it must be remembered that we are dealing at this point not with unfair labor practices, nor even (as in *Oliphant*) with actions to compel admission to membership, but solely with the powers and policies of the Board with respect to certification of unions which practice discriminatory racial policies in determining eligibilty for membershp. Where a union segregates members or excludes or denies full membership status to applicants, on racial grounds, it is violating its duty of fair representation to all members of the unit and should not be permitted to hold a certified status.

There is no need at this time to explore the outer limits of an exclusive representative's duty to admit applicants. Some unions restrict membership to the first-born legitimate sons of members. Others prescribe tests of proficiency or experience. Expulsion from a union may also result in a member of the bargaining unit's being ineligible for membership in his bargaining representative. Whatever may be the bases on which a statutory representative may properly exclude applicants, it seems clear to me that the bases must bear a reasonable relation to the union's role as bargaining representative or to its functioning as a labor organization; manifestly, racial discrimination bears no such relationship.

The argument is raised [8] that the Board cannot constitutionally accord certified status to a union which discriminates on racial grounds. Certification, so the argument runs, is governmental action, and confers a preferred status on the union which receives it. It is argued that such governmental aid to an organization which uses its power in racially discriminatory ways (either by executing contracts which discriminate on racial grounds or by segregating or excluding applicants for membership on such grounds) violates the Federal Constitution as construed in recent Supreme Court decisions. Although I incline to the view that this argument has merit, I need not reach any constitutional issue in this case. My recommendations with respect to the certification are based, as noted above, on my construction of the statute and on the principle that an exclusive representative which, on racial grounds, segregates employees or excludes them from membership, or denies them full and complete membership equality with employees of the majority group, does

[7] Whether the proviso was intended to exempt from the proscriptions of Section 8(b)(1)(A) a labor organization's racially discriminatory membership policies, and whether so construed the proviso would be unconstitutional, are matters outside the reach of this report.

[8] See Weiss, "Federal Remedies for Racial Discrimination by Labor Unions," 50 Georgetown L.J. 457.

not accord to them the fair representation which the statute requires of a bargaining representative. See Wellington, *The Constitution, the Labor Union, and Governmental Action,* 70 Yale L.J. 345, 374.[9]

2. The unfair labor practices

The sole unfair labor practice alleged in the complaint is the refusal of Local 1 to process Davis' grievance, which refusal is alleged to constitute restraint and coercion of Davis in the exercise of his Section 7 rights, in violation of Section 8 (b)(1)(A). Notwithstanding the existence of eminent authority which suggests that conduct like that of Local 1, with respect to Davis in particular and with respect to all the employees in the bargaining unit, violates Section 8(b)(3) and Section 8(b)(2) of the Act (see Cox, "The Duty of Fair Representation," 2 Villanova L.R. 151, 173; Sovern, "The National Labor Relations Act and Racial Discrimination," 62 Columbia L.R. 563, 569–571), General Counsel limited his complaint to the allegation that the refusal to process the grievance violated Section 8(b)(1)(A). Whatever may have been the General Counsel's reason for thus limiting the theory of his case,[10] he has effectively precluded any consideration of the issues pressed by the Charging Party other than those dealing with Davis' grievance. Even with respect to that grievance, General Counsel took the position that it was unnecessary to reach the question whether the conduct vis-a-vis Davis violated any section of the Act other than Section 8(b)(1)(A). As I read the applicable cases, however, I am not limited to the precise subsection of the Act named in the complaint, but may decide whether the conduct complained of violates other subsections. See *N.L.R.B.* v. *Pecheur Lozenge Co., Inc., supra,* 209 F. 2d 393, 402, quoting *American Newspaper Publishers Association* v. *N.L.R.B.,* 193 F. 2d 782, 799–800 (C.A. 7), cert. denied 344 U.S. 812: "Where, as here, the complaint clearly describes an action which is alleged to constitute an unfair labor practice but fails to allege which subsection of the Act has been violated or alleges the wrong subsection, such failure or mistake does not prevent the Board from considering and deciding the charge as presented." Under those cases, I may pass upon whether the *conduct* alleged in the complaint violated *any* provision of the Act. (On the other hand, of course, other violations developed on the record such as the execution of an illegal contract are not before me for decision because *that* conduct was not the subject of the complaint.)

That Local 1 ignored Davis' request to present his grievance is undenied. Local 1 argued before me that it properly declined to handle the grievance because (1) the grievance was totally lacking in merit as Davis was ineligible for the job which, by contract, was a group I or "white" job; (2) the constitution of Independent Metal Workers Union then in effect provided that "Local No. 2 shall have complete, final and exclusive authority to handle and negotiate with Hughes Tool Company all matters of every kind or character pertaining to its members and all other colored employees . . ."; and (3) the apprenticeships were all filled by white persons having reemployment rights in the toolroom, so that Davis' grievance was foredoomed to failure.

Assuming, for the moment, that Local 1's failure to handle the grievance establishes a *prima facie* violation of the Act, none of the three defenses just summarized would overturn such a *prima facie* showing. As to the third ground, it is perhaps true that Davis, even had Local 1 pressed his grievance, would have failed in his bid for an apprenticeship, and that even if Davis had been a member of Local 1

[9] In earlier years the Board held that "Neither exclusion from membership nor segregated membership *per se* represents evasion on the part of a labor organization of its statutory duty to afford 'equal representation.'" Tenth Annual Report, p. 18. A Trial Examiner is bound by Board decisions and should not seek to anticipate authoritative reversal thereof merely because he disagrees with them or because a court of appeals has reversed them. See *Insurance Agents International Union,* 119 NLRB 768, reversed on other grounds, 260 F. 2d 736, and 361 U.S. 477. But the trend of Supreme Court decisions, even prior to the overruling of *Plessy,* was to recognize the inequality inherent in separateness, and a Trial Examiner may reasonably disregard Board pronouncements on this issue which date from an earlier era. In any event, insofar as the certification is concerned, my function is merely to make recommendations to the Board, and not to issue a proposed order. I have little hesitancy in recommending that the Board overrule the cases in which it "temporiz[ed] with seemingly basic principles of democracy." Aaron and Komaroff, footnote 6, *supra.*

[10] The fact that the charge was thus limited did not preclude General Counsel from issuing a more comprehensive complaint. See, e.g., *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.,* 209 F. 2d 393, 401 (C.A. 2), cert. denied 347 U.S. 953.

perhaps his bid would have failed because other applicants may have been more qualified. But the complaint against Local 1 is not based on Davis' failure to get the job, but on Local 1's failure to act in his behalf. The president of Local 1 admitted that if Davis had been a member of Local 1 or eligible for such membership, Local 1 would have investigated his grievance to form an opinion as to its merits. To that extent, at least, Local 1 gave Davis' grievance different treatment from that which would have been given had he been a member of, or eligible for membership in, Local 1.

The first two defenses summarized above reflect both the inherently discriminatory contract and the discrimination as to membership eligibility. With respect to the argument based on the contract—i.e., the argument that Davis' grievance lacked merit because of the agreement between the Company and Local 1 that the apprenticeships were group I jobs—the simple answer is that the agreement furnishes no defense because it excludes from its benefits members of the bargaining unit not eligible for membership in Local 1. Compare *N.L.R.B.* v. *Gaynor News Co.,* 197 F. 2d 719, 722 (C.A. 2), affd. 347 U.S. 17, 47–48. As the Supreme Court there stated with respect to a contract which gave benefits to members of the bargaining representative and withheld them from nonmembers: "Such discriminatory contracts are illegal and provide no defense to an action under Section 8(a)(3)," citing *Steele* and other cases. In the instant case, General Counsel expressly disclaimed any allegation that Local 1 violated the Act by executing the contract which restricted the apprenticeships to white employees. In the light of that disclaimer, I make no finding in this section of this report that the making of the contract violated the Act, although such a finding might well be made, given the necessary allegations. But since Local 1 has injected the contract into the case as a defense, I am compelled to treat of its validity in spite of the General Counsel's failure to urge that it violated the Act, and under *Gaynor* I think it is clear that the contract is illegal and furnishes no defense, regardless of whether or not its execution by Local 1 is alleged to have constituted a violation of the Act.

A closer question is presented by the defense that Local 1 relied on the union constitution which vested Local 2 with the exclusive handling of grievances concerning Negro employees. But, as described above in connection with the reopened representation case, it is my view that a labor organization cannot, when acting as exclusive bargaining representative, lawfully exclude, segregate, or otherwise discriminate among members of the bargaining unit on racial grounds. It may be that when two unions are jointly certified, they may validly agree, for example, that certain jobs or departments would be the primary concern of one, and other jobs or departments the concern of the other, but they may not validly divide the unit on racial lines. Consequently, just as Local 1 may not rely on its illegal contract to justify its failure to handle Davis' grievance, so it may not rely on its "constitutional" restriction against representing Negro employees. And, insofar as the two locals might properly have divided their responsibility over the jobs, it is clear that Local 1 was the union responsible for handling matters relating to apprentices.

To dispose of the three defenses just discussed is not, however, to dispose of the case. We must also inquire whether any defenses were necessary, or, in other words, whether Local 1's failure to process Davis' grievance violated any provision of the Act.

General Counsel's basic contention is that Local 1's failure to process Davis' grievance constituted restraint and coercion in the exercise of Section 7 rights. Reliance is placed on such cases as *Peerless Tool and Engineering Co.,* 111 NLRB 853, 858, enfd. *sub nom. N.L.R.B.* v. *Die and Tool Makers Lodge No. 113, International Association of Machinists, AFL,* 231 F. 2d 298 (C.A. 7), cert. denied 352 U.S. 833, and *M. Eskin & Son,* 135 NLRB 666, enforced as to the union respondent *sub nom. Confectionery & Tobacco Drivers and Warehousemen's Union, Local 805 IBTCWHA* v. *N.L.R.B.,* 312 F. 2d 108 (C.A. 2). In those cases the unions involved conditioned the processing of grievances on the employees' engaging in a certain activity which the unions demanded of them. Although the cases stand for the well-settled proposition that the bargaining representative has the duty of accepting and processing grievances on which its aid is requested by an employee it represents (see also *Conley* v. *Gibson,* 355 U.S. 41, 45–46), their applicability here is considerably diminished by the fact that in those cases the Section 7 right involved was the right to refrain from union activity. No such right is involved here. What is involved here, instead, is Davis' right under Section 7 to have the bargaining agent represent him. If a labor organization which is the exclusive bargaining representative declines to process the grievance of a member of the unit, it has to that extent refused to represent him, and hence it has restrained or coerced him in his exercise of his right to be represented. In essence this is the analysis of the Board

majority in *Miranda Fuel Company,* 140 NLRB 181.[11] Moreover, it should be observed that the dissenters in *Miranda* noted that "the reduction of Lopuch's seniority for his absence from work is a far cry from the arbitrary and invidious discrimination" in such cases as *Steele* or (presumably) the instant case.

In my opinion, Local 1's refusal to process Davis' grievance also violated Section 8(b)(3) of the Act. That section requires the statutory bargaining representative to bargain collectively with an employer. The processing of grievances is, of course, a part of the bargaining function. *Conley* v. *Gibson, supra.* A refusal to process a grievance is, therefore, a refusal to bargain. This does not mean, of course, that the bargaining representative must fight every grievance to the bitter end. As noted above, Local 1 might reasonably have found, after brief investigation, that the grievance was unmeritorious because other applicants were better qualified. But the record is clear that Local 1 did not make even this much inquiry into the matter, and refused to handle Davis' grievance for reasons unrelated to his qualifications for the job. It may be argued that the duty to bargain prescribed by Section 8(b)(3) is a duty the union owes to employers, not to employees in the unit. But nothing in the statutory language requires such a limitation on the union's duty; certainly the employer's corresponding duty runs both to the union and to the employees in the unit. See *Louisville Refining Co.,* 4 NLRB 844, 860–861, enfd. 102 F. 2d 678 (C.A. 6). If, for example, a union which represents a majority should seek to make a "members only" contract, it would appear to be violating its duty to bargain on behalf of all. In that example, it would be dealing with an employer and hence plainly violating Section 8(b)(3). In the instant case it is, in effect, acting on behalf of "members only" when it refuses to deal with the employer concerning Davis' grievance, and its inaction is as much, if not more, of a refusal to bargain than would be its action on behalf of a minority. Cf. Cox, "The Duty of Fair Representation," 2 Villanova L. Rev. 151, 172–174. Since, as is well settled, the majority union has a statutory obligation to represent all employees in the unit fairly in collective bargaining, I find that a breach of that duty is a breach of the duty to bargain.

Finally, with respect to Section 8(b)(2) of the Act, Local 2 urges me to find that Local 1 in bargaining for contracts which discriminated on racial lines caused or attempted to cause the Company to discriminate against members of Local 2 and in favor of members of Local 1. Although I believe that the implications of *Gaynor News, supra,* support this analysis, I am precluded by the narrowness of the complaint from passing on such larger allegations and must confine myself at this point to the question whether Local 1's failure to handle Davis' grievance violated Section 8(b)(2). As I read *Gaynor,* however, the withholding from Davis of treatment which would have been given to him had he been eligible for membership in Local 1 establishes a violation of Section 8(b)(2).

In *Gaynor,* members of the union received certain wage and vacation payments which were not given nonmembers. In defense of the allegation that this discrimination encouraged union membership, the employer urged that no such encouragement could have occurred because union membership was available only to sons of members, and the charging party had already tried without success to join the union. The defense was rejected by the Second Circuit, which pointed out that union admission policies were subject to change, and by the Supreme Court, which noted that by the time the case reached it the union had broadened its admission policies, 347 U.S. at 51–52. The parallel to the instant case, including the subsequent broadening of admission policies, is clear. The union in *Gaynor* was not a respondent, but as the employer there was held to have violated Section 8(a)(3), it is scarcely open to question that the union in that case violated Section 8(b)(2) in that it caused the employer to violate Section 8(a)(3).

The instant case differs from *Gaynor* in that here the beneficiaries of the discrimination included not only members of Local 1 but also all persons eligible for such membership, i.e., all white employees in the unit. If any such employee had filed a grievance like that of Davis, Local 1 would have investigated it. But this distinction is not controlling. I believe the result in *Gaynor* would have been the same if the criterion for receipt of the benefits in that case had been expressed in terms of those eligible for union membership. Local 1 also may urge, with respect to Section 8(b)(2), as it urges with respect to Section 8(b)(1)(A) and 8(b)(3), that it has not violated the Act with respect to Davis because Local 2, and not Local 1, was Davis' representative, and Local 1 (so its argument runs) did not by discrimina-

[11] I am referring, of course, to that part of *Miranda* which deals with Section 8(b)(1)(A). That decision plainly supersedes the position taken in the *amicus* brief filed on behalf of the Board in *Ford Motor Company* v. *Huffman,* 345 U.S. 330, on which brief Local 1 places great reliance.

tion encourage his membership in Local 1 any more than it refused to bargain for him or restrained or coerced him in the right to be represented by the union of his choice. But the answer with respect to all three subsections is the same: Local 1 misconceives its duty as a joint bargaining representative, and it may not divest itself of its bargaining responsibility toward employees in the unit merely because they are members of the other jointly certified union. See *Allied Chemical & Dye Corp.*, 120 NLRB 63, 69; *Sears, Roebuck & Co.*, 106 NLRB 1395, 1396. Moreover, only Local 1 had an agreement with the Company covering apprenticeships, and assuming *arguendo* that such agreement with only one of the jointly certified unions could be valid, the duty to handle grievances relating to that matter necessarily devolved upon that union.

Finally, the majority of the Board held in *Miranda* Fuel Company, 140 NLRB 181, that a labor organization violates Section 8(b)(2) when "for arbitrary or irrelevant reasons or upon the basis of an unfair classification the union attempts to cause or does cause an employer to derogate the employment status of an employee," and that "union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status." What is said in *Miranda* with respect to union *action* would appear equally applicable to *inaction* which was founded upon "arbitrary or irrelevant reasons or upon the basis of an unfair classification."

I find, therefore, that Local 1's failure to process or investigate Davis' grievance violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act.

CONCLUSION OF LAW

Local 1, by failing and refusing to investigate or handle the request of Ivory Davis that it intercede for him with respect to his bid on the apprentice program, restrained and coerced Davis in the exercise of his Section 7 right to be represented by a representative of his own choosing, refused to bargain on his behalf, and caused or attempted to cause unlawful discrimination against him violative of Section 8(a)(3), thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A), (2), and (3) and Section 2(6) and (7) of the Act.

THE REMEDY FOR THE UNFAIR LABOR PRACTICES

The conventional remedy for unfair labor practices is the issuance of an order directing the violator to cease and desist from his unlawful conduct and to take affirmative action to remedy the violations, including, *inter alia,* the posting of an explanatory notice to employees. The unfair labor practices here are unique, however, and several considerations necessitate the conclusion that use of a conventional order and notice in this case would not fully effectuate the purposes of the Act.

The fact that Local 1 approved amendments to its constitution and bylaws so as to eliminate racial discrimination, and the added fact that the new contract does not provide for such discrimination, do not, of course, make the case moot. The law is well settled that voluntary discontinuance of illegal conduct after the commencement of litigation does not moot a case. Moreover, this is not a situation where a respondent has ceased its unlawful conduct and also has ceased to exist. Local 2 apparently continues to exist and indeed has a new president chosen after the hearing in this case. Too, T. B. Everitt, president of Local 1 at the time of the unfair labor practices, signed an affidavit on January 18, 1963 (see Trial Examiner's Exhibit No. 2, footnote 5, *supra*) in which he refers to himself as president of Local 1, and he also signed the new contract on January 14, 1963, although the record contains no suggestion that any new selection of officers (other than that of Columbus Henry) occurred after the hearing. Under these circumstances I cannot find that the Respondent has ceased to exist in the sense that it would be unable to comply with an appropriate remedial order.

A further consideration arises out of my belief, more fully set forth in the next section of this report, that the certification issued jointly to Local 1 and Local 2 should be revoked. Because the violations arose out of Local 1's failure to perform the duties imposed on it as a bargaining representative of the employees, the normal remedy would be to direct it to perform those duties. But in this case I am recommending that Local 1 be shorn of its certified status. Moreover, as the Steelworkers have a petition on file, I deem it inappropriate to issue an order which would bestow upon Local 1 status as sole bargaining representative. Finally, insofar as the unfair labor practice case is concerned, the basic violation lies in the general racial discrimination practiced by Local 1 in its contracts and in its membership policies, but General Counsel saw fit to limit the case to the particular discrimination against Davis. To the extent, however, that the treatment of Davis reflects Local 1's treat-

ment of an entire class, the remedy properly may go to the entire pattern of discrimination and need not be confined to the individual manifestation alleged in the complaint. See *N.L.R.B.* v. *Piqua Munising Wood Products Co.,* 109 F. 2d 552, 557 (C.A. 6); cf. *Charles Fay as president of Amalgamated Machine Instrument and Metal Local 475, UE (Parker-Kalon Corp.)* v. *Douds,* 172 F. 2d 720, 725 (C.A. 2).

I shall therefore recommend that, if Local 1 should become the bargaining representative of the employees in the appropriate unit, it shall cease and desist from making any contracts or agreements in which job opportunities are dependent upon race or color or membership in Local 1, and from refusing to represent any employee in the handling of any grievance because of race or color or nonmembership in Local 1. Affirmatively, I shall recommend that Local 1 post a notice at appropriate places reciting in essence that if it should become the bargaining representative it will perform its statutory obligations without discrimination based on race or color or nonmembership. The Recommended Order will not require Local 1 to take any present action with respect to the Davis grievance because such action would be inconsistent with the forfeiture of status, because the record indicates that Davis for nondiscriminatory reasons would not have qualified for the job on which he bid, and because in the event of a recurrence of the situation (i.e., Local 1's becoming the representative and Davis' again requesting that it represent him) the proposed order will encompass the situation.

Recommendations Respecting the Certification

In *Pioneer Bus Company, Inc.,* 140 NLRB 54, where the bargaining representative executed contracts which discriminated on racial lines, the Board stated that such action warranted revocation of the certification. The Board did not revoke in *Pioneer* (where no motion for revocation had been filed) because it deemed revocation unnecessary "in view of the impending election which we here direct." I am not empowered to, and do not, direct an election, but I regard *Pioneer* as dispositive on the issue of revocation. My recommendation that the certification be revoked rests not only on Pioneer, but also on the showing that the certified unions here operated under a policy which separated the members into separate locals on racial lines, a practice which I regard as basically incompatible with a bargaining agent's duty of fair representation of all employees in the unit. My recommendation further rests on the finding that the bargaining agent engaged in unfair labor practices inconsistent with the discharge of its statutory duty to represent fairly all employees in the unit.

Local 1 has moved that the certification be amended, not rescinded, in the light of reforms effected after the filing of the motion to rescind, including the elimination of racial discrimination from the contract and from the membership policies of Local 1. Local 1's motion is that the certification be amended to bestow sole representative status upon it. It well may be, as Local 1 argues, quoting *Whitfield* v. *United Steelworkers of America,* 263 F. 2d 546, 551 (C.A. 5), cert. denied 360 U.S. 902, that "Angels could do no more." It also may be that a labor organization which aspires to exclusive bargaining status could do no less and have its name on the ballot in a Board election. In any event, giving all credit to Local 1 for its reforms—the more noteworthy in view of its insistence on racial discrimination as recently as 2 months before the hearing—I believe that rescission of the certification is essential in the light of the record.

Among other reasons for rescinding the certification, rather than amending it so that it would run only to Local 1, is the fact that the certification ran jointly to Local 1 and Local 2, and both locals are still in existence. They jointly achieved certified status following a contest with the Steelworkers, but it is by no means a certainty that Local 1, after abandoning its policies of segregation, can obtain majority support.[12] In this connection it should be noted that Steelworkers filed a petition in December 1962, when no contract existed between Local 2 and the Company, and when Local 1's contract, assuming that it had any vitality, did not bar the Steelworkers from raising a question concerning representation because the contract discriminated on racial lines. *Pioneer Bus, supra.* The present contract which appears to contain no racially discriminatory provisions was executed after the filing of the

[12] Local 1 had between 900 and 1,000 members at the time of the hearing. At the meeting on the new contract, 37 members of Local 1 voted for it, 23 against, 43 abstained, and the rest were absent.

Steelworkers' petition, and I believe that under those circumstances the Board should not extend or amend a certification which was vulnerable to rescission and under challenge from another labor organization at the time the new contract was signed.

In *A. O. Smith Corp.*, 119 NLRB 621, the Board rescinded a certification for 6 months because the certified union had failed to represent all employees in the unit. Apparently the Board felt that such disregard of the duty of fair representation should be met with rescission of the certification although there was no reason to believe that the union in that case would have acted unfairly in the future. The far more egregious conduct shown on this record should result in no lesser action.

In the light of the long history of racial discrimination at the Hughes plant, a history in which the Steelworkers and the Company, as well as the Independent Metal Workers Union, have played, in varying degrees, something more than acquiescent roles, I further recommend that in any future representation proceedings involving this plant the Board make it inexorably clear to all participants that the Board will not tolerate racially discriminatory practices on the part of any union which it certifies. I recommend, therefore, that the Board require, as a condition of certifying any labor organization at the plant, that the certified organization post in its offices and on all plant bulletin boards on which it has permission to post notices, the following notice:

NOTICE TO ALL EMPLOYEES

> This labor organization has been certified by the National Labor Relations Board as the bargaining representative of the employees in the unit described below. The certification is conditioned upon our not discriminating against any employee because of his race or color, both with respect to membership in this labor organization on terms fully equal to those afforded any member and with respect to terms and conditions of employment and opportunities for advancement under any contract we may negotiate with management. Any person who believes that this labor organization is not observing a policy of nondiscrimination should bring the matter to the attention of the National Labor Relations Board, Washington 25, D.C., or the Board's Regional Office in Houston.

The above should be followed by a description of the unit, and by the name of the labor organization and the handwritten signature of its president. Such notice should remain posted during the life of the certification, not merely for 60 days nor even 1 year. Whether a similar notice should be required in subsequent certifications is a matter which may be left open, perhaps pending the advice at that time of the Regional Director.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusion of law, and upon the entire record in this case, I recommend that the Respondent, Independent Metal Workers Union, Local No. 1, its officers, agents, successors, and assigns, shall: [13]

1. Cease and desist from:

(a) Restraining or coercing employees in the exercise of their rights under Section 7 of the Act by failing or refusing to handle or investigate their grievances where such failure or refusal is occasioned by considerations of race, color, or union membership.

(b) Causing or attempting to cause Hughes Tool Company to discriminate against any employee by making or enforcing agreements which provide benefits to employees who are members of Local 1 or are eligible for membership, while withholding like benefits from employees to whom membership is unavailable.

(c) Refusing to bargain on behalf of any or all employees in the bargaining unit by failing or refusing to handle or investigate a grievance filed by a member of the baraining unit where such failure or refusal is caused by the employee's race or color or union membership, or is caused by a belief that the grievance is ill-founded because of the employee's race or color or union membership.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, investigate and handle grievances filed by Ivory Davis or any other member of the bargaining unit, without regard to the race, color, or union membership of the grievant.

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[13] Provisions 1(a) through 2(a) of this Order shall be inapplicable when Respondent shall not be the representative of the employees in an appropriate unit, pursuant to Section 9(a).

(b) Post at its business office and meeting hall, copies of the attached notice marked "Appendix."[14] Copies of said notice, to be furnished by the Regional Director for the Twenty-third Region, shall, after being duly signed by an authorized representative of Respondent, be posted by it immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicious places, including all places where notices to members are customarily posted (including all such places in the Hughes plant). Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to said Regional Director signed copies of said notice for posting by Local 2, if that local so desires, in places where notices to its members are customarily posted.

(d) Notify said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply herewith.[15]

[14] In the event that this Recommended Order be adopted by the Board, the words "as Ordered by" shall be substituted for the words "as Recommended by a Trial Examiner of" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order of" shall be inserted immediately following the words "as Ordered by."

[15] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES OF HUGHES TOOL COMPANY

As recommended by a Trial Examiner of the National Labor Relations Board and in order to conduct our union as required by the National Labor Relations Act, we notify you that in the event we should become the bargaining representative of the employees:

WE WILL NOT execute any contract which discriminates among employees as to job opportunities, or any other term or condition of employment, because of race or color.

WE WILL investigate and handle any grievance brought to us by an employee without regard to his race or color.

INDEPENDENT METAL WORKERS
UNION, LOCAL NO. 1,
Labor Organization.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas, Telephone No. Capitol 8-0611, Extension 296, if they have any question concerning this notice or compliance with its provisions.

Standard Manufacturing Company *and* United Steelworkers of America, AFL-CIO. *Case No. 16-CA-1911. July 14, 1964*

DECISION AND ORDER

On December 13, 1963, Trial Examiner C. W. Whittemore issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) of the Act. With respect to certain other